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Supreme Court of the United States

OCTOBER TERM, 1936.

No. 667.

ANNISTON MANUFACTURING COMPANY, *Petitioner*,

v.

HARWELL G. DAVIS, Collector of Internal Revenue.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BRIEF FOR PETITIONER.

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BRIEF FOR PETITIONER.

OPINIONS BELOW.

The opinion of the District Court for the Northern District of Alabama in the present and similar cases is reported in 15 F. Supp. 257, under the name of *Lincoln Mills of Alabama* v. *Davis* (R. 38-39). The opinion of the Circuit Court of Appeals (R. 47-59) is not yet officially reported.

JURISDICTION.

The judgment of the Circuit Court of Appeals was entered January 8, 1937 (R. 60). The petition for a writ of

certiorari was filed January 21, 1937, and was granted February 15, 1937 (R. 61). The jurisdiction of this Court rests on Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTION PRESENTED.

Whether the provisions of Title VII of the Revenue Act of 1936 are constitutional and operative in so far as they attempt to restrict or defeat petitioner's vested right of action against a collector of internal revenue for the recovery of amounts illegally exacted from petitioner, by the collector, as taxes under the unconstitutional Agricultural Adjustment Act.

STATUTES INVOLVED.

The pertinent provisions of Title VII and Title III of the Revenue Act of 1936 (Act of June 22, 1936, c. 690, secs. 901 *et seq.* and sec. 501) are set forth in the Appendix, *infra*. There are also set forth in the Appendix the provisions of Sections 3220, 3224, 3226, and 3228 of the Revised Statutes as amended, the provisions of Section 424(a) of the Revenue Act of 1928, and the provisions of Section 21(d)(1) of the Agricultural Adjustment Act, as amended by the Act of August 24, 1935. Other statutory provisions are quoted at pertinent places throughout the brief.

STATEMENT.

This action was brought by petitioner for the recovery of approximately $270,000.00, which respondent, a collector of internal revenue, had collected from petitioner as floor stock and processing taxes under the purported authority of the Agricultural Adjustment Act,[1] which was held unconstitutional in *United States* v. *Butler*, 297 U. S. 1. The

[1] Act of May 12, 1933, c. 25, Title I, 48 Stat. 31, 7 U. S. C. A. Secs. 601 *et seq.*

District Court sustained respondent's general demurrer and dismissed the amended complaint (R. 40), and this judgment was affirmed by the Circuit Court of Appeals (R. 60).

It is alleged in the amended complaint that all of the amounts in controversy were paid by petitioner to respondent under duress and that at the time of making all of said payments (except the first three, involving less than $8,000.00), petitioner protested to respondent that said taxes were illegal and unconstitutional (R. 19). The complaint also alleges that claims for refund had been filed with respondent on the ground that the Agricultural Adjustment Act was unconstitutional and said taxes were illegal by reason of several provisions of the Constitution, including the Tenth Amendment (R. 4-7, 11-14). It is alleged further that the claims were rejected by the Commissioner prior to suit (R. 4, 11).

It is undisputed that as the law stood at the time petitioner's claims were rejected, petitioner was entitled to recover upon the basis of the allegations in the complaint. However, after the cause of action arose, Congress added Section 21(d) to the Agricultural Adjustment Act by the amendatory act of August 24, 1935.[2] That Section denied to processors the right to recover refunds of taxes illegally collected under that Act, unless they could establish that they had not included the tax in the price charged for their products, that they had not passed on any part of the tax to others, and that they had not reduced the price which they paid for the raw commodity by any part of the tax.

Section 21(d) was repealed by the Revenue Act of 1936 and new provisions were enacted in Title VII of that Act, relating to "Refunds of Amounts Collected Under the Agricultural Adjustment Act".[3]

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[2] Act of August 24, 1935, c. 641, sec. 30, 49 Stat. 771, 7 U. S. C. A. Sec. 623(d), Appendix, p. 99, *infra*.

[3] Act of June 22, 1936, c. 690, secs. 901 *et seq.*, 49 Stat. 1747, 7 U. S. C. A. secs. 644-659, Appendix, pp. 79-91, *infra*.

In his amended demurrer respondent relied for a defense upon the provisions of Title VII of the 1936 Revenue Act, which are summarized below.

Section 902 of that Act provides in general that no refund shall be allowed of any amount collected as tax under the Agricultural Adjustment Act unless the claimant establishes that he bore the burden of such amount and has not shifted such burden, directly or indirectly, through inclusion in the price of articles claimant sells, through reduction of the price paid for the unprocessed commodity, "or in any manner whatsoever".

Section 903 requires the filing of new claims for refund, after the passage of the 1936 Act. Section 904 provides that no suit shall be brought to recover amounts collected as floor stock or compensating taxes under the Agricultural Adjustment Act, before the expiration of 18 months after a claim is filed under Title VII. Section 906 prohibits the maintenance of suits or proceedings to recover amounts collected as processing taxes, except as provided in Section 906. That section goes on to create a Board of Review in the Treasury Department, before which claims for refund of processing taxes may be prosecuted. Provision is made for review of the Board's decisions in the Circuit Courts of Appeals and for review by this Court of the judgments of such courts on writs of certiorari. Section 907 establishes a statutory presumption for determining the extent of "shifting" by the processor, based solely upon a comparison of manufacturing margins during the tax period and during a specified comparative period.

Section 910 provides that no collector of internal revenue shall be in any way liable for any act done by him under the Agricultural Adjustment Act in the performance of his official duties under the provisions of such Act.

In sustaining respondent's general demurrer the District Court upheld the validity of Title VII upon the authority of *United States* v. *Jefferson Electric Mfg. Company*, 291 U. S. 386. The Circuit Court of Appeals affirmed the judg-

ment of the District Court on other grounds, and expressly stated that under its view it was unnecessary to consider the effect of the decision of this Court in the *Jefferson Electric Company* case. The Circuit Court of Appeals held that this action is a suit against the United States originally "consented to by it through the fiction of a suit against the Collector" (R. 54). It held further that Congress, in the exercise of sovereign immunity to suit, had withdrawn consent to suits of this kind, and that this withdrawal was effective to cut down vested rights of action based upon the collector's exaction of money under an unconstitutional statute, *even if no substitute remedy was provided* (R. 54, 59). The court below further held that, except by provision of statute, no right of action could have arisen against the collector for the wrongful exaction from petitioner of money under the unconstitutional Agricultural Adjustment Act for the reason that the unconstitutionality of the Act was "far from plain" and had not been searched out and declared at the time of the collections here in question (R. 56-59).

SPECIFICATION OF ERRORS.

The Circuit Court of Appeals erred:

1. In holding that Congress can, consistently with the due process clause of the Fifth Amendment, destroy a taxpayer's vested right of action to recover from a collector amounts collected as taxes under an unconstitutional statute without affording any other remedy.

2. In holding that this action was not against the collector, personally, but was in reality an action against the United States.

3. In holding that the District Court was without jurisdiction to entertain this action.

4. In failing to hold that the provisions of Title VII violate the due process clause of the Fifth Amendment in attempting to restrict and defeat petitioner's action against a collector for the recovery of amounts exacted as taxes under the unconstitutional Agricultural Adjustment Act.

5. In failing to hold that Section 902 of the Revenue Act of 1936 is void under the due process clause of the Fifth Amendment as impairing petitioner's right to a refund.

6. In failing to hold that Section 902 is void under the constitutional doctrine of the separation of powers in that it is so vague, uncertain and ambiguous that an attempt by the courts to give it a definite construction would require the courts to legislate.

7. In failing to hold that the procedural provisions (Sections 903, 904 and 906) of Title VII are inseparably connected with Section 902 and therefore fall with that section.

8. In failing to hold that Section 906 is void under the due process clause of the Fifth Amendment as denying any effective judicial remedy for the collection of an unconstitutional tax.

9. In failing to hold that Section 906 is void under the due process clause of the Fifth Amendment as denying a fair and effective administrative remedy for the collection of an unconstitutional tax.

10. In affirming the judgment of the District Court.

SUMMARY OF ARGUMENT.

Respondent will not deny that each count of the complaint herein would set forth a cause of action for the recovery of the sums in question if it were not for Title VII of the Revenue Act of 1936, which was enacted seven months after suit was filed. The right of action which petitioner had to recover back such sums had vested prior to August 24, 1935, when Congress made the first attempt, by Section 21(d) of the AAA, to block recovery of amounts collected under the authority of the AAA.

It is established by decisions of this Court that such a right of action is property, subject to the protection and guarantees of the Fifth Amendment to the Constitution; and that such right cannot be destroyed, either directly or under the guise of a regulation of procedure.

It is also well established that the Collector of Internal

Revenue is personally liable for the wrongful collection of money under an unconstitutional statute, and that the collector's personal liability cannot be defeated by the sovereign's claim of immunity to suit.

The vested right of action which petitioner had against the collector personally could not be destroyed, without regard to whether any alternative remedy is provided against the United States.

But even on the theory that the right of action could be taken away if a fair and adequate remedy were set up in its place, it is clear that the so-called remedy which Title VII purports to afford is in reality no remedy at all. The effect of Title VII is to deny all remedy with reference to the illegal collection of sums under the AAA.

The terms used in Section 902 are so vague and uncertain that the purported remedy under Title VII cannot be compared with the remedy which it seeks to displace. Moreover, Section 902 is susceptible of many different constructions, one as plausible as the other. It would require legislation, and not merely construction, by the courts, to give the section a *definite and precise* meaning.

It may be assumed that the *general purpose* of Section 902 is to deny refunds to processors to the extent that the processors have been able to charge more in the sale of their goods, or to pay less in the purchase of raw commodities, than the prices which would have prevailed if the processing tax had not been imposed. The proof of these facts in the case of a cotton processor would involve a comparison of the actual prices paid for raw cotton, and actual prices received for manufactured cotton goods during the twenty months tax period, with the market prices which *would have* prevailed for raw cotton and the finished goods *if* the processing tax had not been imposed. The facts as to what prices would have prevailed under such imaginary conditions clearly are not susceptible of legal proof, and yet the processors are required to prove such facts in order to recover. Section 902 standing alone, therefore, affords no remedy.

The presumption created by Section 907 is so arbitrary and unreasonable as to make apparent, on a casual examination, what the whole history of the legislation confirms—that the purpose of Title VII was to bar recovery by processors in as many cases as could be brought within a statute which was thought to have even a semblance of constitutionality.

Even if it should be conceded that Title VII does not impose an absolutely impossible burden of proof, it must be conceded that the proof as to who bore the economic burden of the tax is, to say the least, highly difficult to produce, and highly uncertain and speculative in character; and the imposition retroactively of such a burden of proof upon the holder of a vested legal right of action clearly impairs that right in violation of the Fifth Amendment.

Aside from the impossibility or difficulty or proof, the shifting of the economic burden of the processing tax, even if any such shifting occurred, cannot be made a basis for denying recovery to the processor from whom such tax has been unconstitutionally exacted. Even if the processor has shifted the amount of the tax to others, he may have suffered damages largely in excess of the amount of the tax, by reason of a shift in consumption or decrease in market resulting from the imposition of the tax.

But even if a processor has shifted the amount of the tax, and has suffered no other damage from the imposition of the tax, he is not *unjustly* enriched by the recovery back of the taxes illegally exacted from him. A processing tax refund in such a case is no different from a refund of ad valorem taxes, rebates of freight over-charges, or any other decrease or allowance in items representing the seller's overhead and cost of production. Where the parties had agreed upon a definite flat price to be paid for specific goods, no principles of equity, justice or public policy would sanction upsetting the consummated transactions between the parties. The seller often profits, but he does not profit unjustly, where the trade generally has overestimated production costs; and he loses where the trade has underesti-

mated these costs. This is fundamental in our economic system. It would be shocking to suggest that Congress could by retroactive legislation alter the contract of the parties and require the seller to rebate a portion of the agreed price to the purchaser. If Congress is thus powerless to change the respective rights of buyer and seller, it certainly cannot destroy the processor's right against the collector on the ground that the processor would otherwise receive a refund to which his customers would be equitably entitled.

If a taxpayer sells goods at a stated price and undertakes to collect the tax as such from the purchasers, he may be legally or equitably bound to hold any refund for the purchasers' account. In such a case, Congress might protect the purchasers by a statute in the nature of a real party in interest statute, such as this Court considered to be involved in the case of *United States* v. *Jefferson Electric Mfg. Co.*, 291 U. S. 386. However, as pointed out above, Title VII does not purport to restrict the taxpayer's right to refund on the basis of any such circumstance, and therefore cannot be justified as a real party in interest statute.

The administrative and procedural provisions of Title VII are inseparably connected with Section 902 and fall with that section.

The Court is presented here with a situation which has no parallel in the history of the United States. Large sums were exacted as taxes under an unconstitutional statute at a time when the taxpayer had a clear and adequate remedy for the recovery of the full amounts in a suit against the Collector, or in a suit against the United States, as he might choose. On account of the existence of these adequate legal remedies for recovery, he could not obtain an injunction. After the exactions were made, and the legal rights to recover had vested, Congress enacted a statute which requires as a condition precedent to recovery proof of facts which have no relation to the illegal exactions, and which are not susceptible of legal proof. In practical effect it has thus destroyed the rights. A deci-

sion of this Court upholding such legislation would constitute a precedent dangerous beyond measure, and would, if carried to its logical conclusion, mean the end of official responsibility—the fundamental principle on which constitutional government rests.

ARGUMENT.

I.

Petitioner Had a Vested Right of Action Against the Collector Which the Fifth Amendment Protects Against Impairment.

The sums here in controversy were collected by respondent under the purported authority of the AAA, which was held unconstitutional in the case of *United States* v. *Butler*, 297 U. S. 1. Apart from the provisions of Title VII of the Revenue Act of 1936, it would be indisputable that petitioner had a right of action for the recovery back of such sums. We shall show that this right of action had become vested and could not be destroyed without violating the Fifth Amendment. Respondent was personally liable for collecting such sums under an unconstitutional statute, and Section 910 of the 1936 Act is itself unconstitutional in attempting to destroy the personal liability of respondent. Although we will urge that Section 910 would be invalid on that account without regard to the question as to whether any alternative remedy is provided against the United States, it will be developed later [under propositions II(B) and (C)] that Title VII of the 1936 Act does not afford any fair substitute remedy against the United States. In other words, *Title VII attempts to deny all remedy for the wrongful collection of taxes under the unconstitutional AAA.*

A. Petitioner Had a Vested Right of Action to Recover Back the Full Amount of Processing Taxes Illegally Collected.

The Collector of Internal Revenue in this case was allowed to collect millions of dollars in floor stock and processing taxes under the Agricultural Adjustment Act. With the force of the Government and the power of distraint behind him, he collected from petitioner about $270,000.00 as such taxes (R. 2, 9). In making all except about $8,000.00 of such payments, petitioner protested to respondent that the taxes were illegal and unconstitutional (R. 19). Payment was made nevertheless because under our system of revenue laws the policy has long been established that the taxpayer cannot stay the hand of the collector because he considers any particular exaction illegal or unconstitutional.[4] But it is also well established that due process of law requires that *some* effective remedy be afforded with reference to the illegal collection of taxes. *Brinkerhoff-Faris T. & S. Co.* v. *Hill*, 281 U. S. 673; *Carpenter* v. *Shaw*, 280 U. S. 363; *Ward* v. *Love County*, 253 U. S. 17. Where the remedy of injunction is denied, some effective *refund* remedy must be provided. In our system of revenue laws, a taxpayer must pay first and litigate afterwards. An effective refund remedy meets the requirement of due process.

It is beyond question that at the time respondent collected the sums here involved petitioner had a right to maintain an action for the recovery back of such sums on the ground that they were collected under an unconstitutional statute. It was recognized that such an action could be maintained

[4] Section 3224 of the Revised Statutes (26 U. S. C. A. Sec. 1543) provides: "No suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court." See also *Bailey* v. *George*, 259 U. S. 16.

either against the United States[5] or against the collector who wrongfully collected the tax.[6] Although the general provisions of law recognizing proceedings for the recovery back of internal revenue taxes illegally collected[7] were broad enough to cover the cases of taxes imposed under the AAA, Section 19(b) of the original AAA specifically made such provisions of general law applicable in the case of taxes imposed under that Act.

Relying upon this "system of corrective justice intended to be complete",[8] petitioner paid the amounts demanded and filed claims for refund, which were rejected by the Commissioner before suit was commenced (R. 4, 11). Thus all conditions precedent to suit, under the statutory provisions just mentioned, were complied with before Congress began to tamper with the well established remedy at law for the recovery back of such amounts.

It was perfectly clear under the general provisions of law in force at the time of the illegal collections that the taxpayer was entitled to recover the *full* amount collected in the event that it should be held that the collection was illegal. The amount of the illegal collection was the measure

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[5] *United States* v. *Emery, Bird, Thayer R. Co.*, 237 U. S. 28.

[6] A right to sue the collector personally where the tax was paid under protest was recognized at common law in the absence of any statutory provisions covering the refund of taxes illegally collected. *Elliott* v. *Swartwout*, 10 Pet. 137; *Erskine* v. *Van Arsdale*, 15 Wall. 75, 77; *DeLima* v. *Bidwell*, 182 U. S. 1, 177-180. The greater portion of the sums in controversy were paid under protest (R. 19), although protest has not been a necessary condition for the maintenance of an action against either the United States or the Collector, since the amendment of Section 3226 of the Revised Statutes, which was made by the Revenue Act of 1924. *George Moore Ice Cream Co.* v. *Rose*, 289 U. S. 373.

[7] See U. S. Rev. Stat. Secs. 3220, 3226, 3228 (26 U. S. C. A. Secs. 1670, 1672-1673, 1433) Appendix, pp. 101-102, *infra*.

[8] *Graham* v. *DuPont*, 262 U. S. 234, 255.

of recovery,[9] undiminished on account of any shifting of the tax burden[10] in transactions with third parties.

B. A Vested Right of Action for the Recovery of Money Cannot Be Impaired Without Violating the Fifth Amendment.

It has always been recognized that the property of which persons cannot be deprived under the due process clauses of the Fifth and Fourteenth Amendments[11] is not solely tangible property. The constitutional protection extends to intangible property as well, and includes vested rights of action. This Court has held that "a vested right of action is property in the same sense in which tangible things are property, and is equally protected against arbitrary interference". *Pritchard* v. *Norton*, 106 U. S. 124, 132. See also *Gibbes* v. *Zimmerman*, 290 U. S. 326, 332; *Graham* v. *Goodcell*, 282 U. S. 409, 429; *Ettor* v. *Tacoma*, 228 U. S. 148, 156; *Steamship Co.* v. *Joliffe*, 2 Wall. 450, 457, 458; *Forbes Pioneer Boat Line* v. *Board of Commissioners*, 258 U. S. 338; *Coombes* v. *Getz*, 285 U. S. 434.

The principle that a vested right of action cannot be im-

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[9] R. S. Sec. 3220 authorizes the Commissioner "to remit, refund, and pay back *all taxes* erroneously or illegally assessed or collected." 26 U. S. C. A. Sec. 1670. Section 3226 recognizes a taxpayer's right to maintain a "suit • • • for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected." 26 U. S. C. A. Secs. 1672-1673. (Italics supplied.) See Appendix, pp. 101-102, *infra*.

[10] The subject of shifting tax burdens is more fully discussed, *infra*, under propositions II(B) and II(C).

The question of the ultimate damage resulting from an illegal tax is impossible to determine. But it has always been clear that a taxpayer from whom a tax has been illegally collected can recover back the amount of the illegal collection without regard to *ultimate damage*. Cf. *Southern Pacific Co.* v. *Darnell-Taenzer Lumber Co.*, 245 U. S. 531, 533 (involving recovery of freight overcharges).

[11] "The restraint imposed upon legislation by the due process clauses of the two amendments is the same. *Coolidge* v. *Long*, 282 U. S. 582, 596." *Heiner* v. *Donnan*, 285 U. S. 312, 326.

paired by subsequent legislation was held to apply with respect to a cause of action in quasi-contract arising out of a statutory liability. *Steamship Co.* v. *Joliffe, supra.* It has also served to invalidate a statute aimed at the destruction of a right of action to recover money paid under duress. *Forbes Pioneer Boat Line* v. *Board of Comissioners, supra.* The principle has also been applied with respect to a cause of action given by statute against a city for consequential damages from street grading of a kind for which the city, as a state governmental agency, could not be held in the absence of statute. *Ettor* v. *Tacoma, supra.* In the case of *Graham* v. *Goodcell, supra,* which is more fully discussed later as an authority for the proposition that an action against a collector cannot be defeated by virtue of the sovereign immunity to suit, this Court also recognized the general rule that "it is not consistent with due process to take away from a private party a right to recover the amount that is due when the act is passed". 282 U. S. at 426.

The constitutional protection of vested rights extends to the measure of damages authorized by law at the time the cause of action arises. *Kay v. Penn. R. R.* Co., 65 Pa. 269; *Lewis* v. *Penn. R. R. Co.*, 220 Pa. 317; *Preveslin* v. *Derby & Ansonia Developing Co.*, 112 Conn. 129. Otherwise the due process clause would constitute only a partial protection.

The case of *United States* v. *Jefferson Electric Manufacturing Company*, 291 U. S. 386, upon which respondent relies, is in no way inconsistent with the contentions which we are here making. That case is fully discussed under proposition II(D), p. 65, *infra.* It involves consideration of principles which are yet to be developed in this brief and it is believed that consideration of the case should properly be left until those principles have been discussed.

C. Congress Cannot Under the Guise of Regulating Matters of Procedure and Remedies Render a Vested Right of Action Unenforceable and Thus Destroy It.

Legislatures cannot circumvent the constitutional guarantee against the impairment of vested rights through the guise of regulating matters of procedure and remedies. We recognize, of course, that the States or the Federal Government can go far, consistently with due process of law, in changing court procedures and the remedies provided for the enforcement of vested rights. As this Court has said, a suitor "has no property, in the constitutional sense, in any particular form of remedy; all that he is guaranteed by the Fourteenth Amendment is the *preservation of his substantial right to redress by some effective procedure*". *Gibbes* v. *Zimmerman*, 290 U. S. 326, 332. (Italics supplied)

It is clear, also, that the legislature may impose certain conditions precedent to the maintenance of an action. In the case of *Jones* v. *Union Guano Company*, 264 U. S. 171, the court, in upholding the validity of the conditions there imposed, said (p. 181):

> "The 14th Amendment does not prevent a state from prescribing a reasonable and appropriate condition precedent to the bringing of a suit of a specified kind or class so long as the basis of distinction is real and the condition imposed has reasonable relation to a legitimate object."

But it is just as clear that due process of law requires that *some* effective remedy be afforded for the enforcement of vested rights of action, and that legislation which purports to affect a remedy alone must be held unconstitutional if its practical effect is to destroy or impair a vested right of action. *Ettor* v. *Tacoma*, 228 U. S. 148, 155; *Truax* v. *Corrigan*, 257 U. S. 312, 329, 339; *Brinkerhoff-Faris Trust & Savings Co.* v. *Hill*, 281 U. S. 673, 679, 680.

The mere fact that the legislature, in seeking to destroy vested rights, employs the form of a statute affecting court

procedure or remedies, will not save from unconstitutionality a statute which in substance and effect does destroy or impair such rights. The relations between rights and remedies in this regard has been described by this Court as follows:

> "Rights and remedies shade one into the other so that it is sometimes difficult to say that a particular act creates a right or merely gives a remedy. So also *a statute, under the form of taking away or changing a particular remedy, may take away an existing property right*, or impair the obligation of a contract." *Ettor* v. *Tacoma*, 228 U. S. 148, 155. (Italics supplied.)

Thus, in another case where a Government had attempted to avoid its just obligations by one means after another, it finally resorted to the device of imposing a practically impossible burden of proof upon anyone who attempted to assert rights based upon such obligations. In *McGahey* v. *Virginia*, 135 U. S. 662, it appeared that certain bonds issued by the state provided that the coupons should be receivable at maturity in their face amount for taxes of all kinds. After several unsuccessful attempts (such as the attempt involved in the case of *Poindexter* v. *Greenhow*, *infra*) to defeat this obligation, legislation was adopted requiring the institution of suit to recover taxes in all cases where coupons from state bonds were tendered. The legislature further provided that in all such litigation, the burden should be on the taxpayer to produce the bonds from which the coupons were cut in order to establish the genuineness of the coupons. The statute also prohibited expert testimony to prove the genuineness of coupons which did not bear the personal signature of the proper officer. It had become customary to cut matured coupons from state bonds, and such detached coupons were traded in generally. None of the coupons from state bonds bore the personal signature of any state officer but bore engraved facsimiles. Under these circumstances it was practically impossible for any coupon holder to establish the genuineness of such

coupons and this Court, therefore, held these statutory provisions unconstitutional. In the opinion of the Court, written by Mr. Justice Bradley, it was said (p. 694):

> "We have no hesitation in saying that the duty imposed upon the taxpayer of producing the bonds from which the coupons tendered by him were cut, at the time of offering the same in evidence in court, was an unreasonable condition, *in many cases impossible to be performed.* If enforced it would have the effect of rendering valueless all coupons which have been separated from the bonds to which they were attached, and have been sold in the open market. • • • It would be so *onerous and impracticable* as not only to affect, but virtually destroy, the value of the instruments in the hands of the holder who had purchased them. We think that the requirement was unconstitutional." (Italics supplied.)

A somewhat similar situation was presented in the case of *Marsh* v. *Burroughs*, 1 Woods 463, 16 Fed. Cas. No. 9112 (C. C. S. D. Ga.). That case involved a provision of the Georgia (Carpetbag) Constitution of 1868 to the effect that in suits on notes, bills, etc., if the defendant swears he has reason to believe that the instrument was given or used in furtherance of "the rebellion", the plaintiff will have the burden of proving the contrary. In holding this provision repugnant to the United States Constitution, Circuit Judge Bradley said:

> "But the final portion, which throws the burden of proof on the plaintiff to show that the bills have never been used in aid of the Rebellion • • • imposes upon plaintiff an impossibility, and is tantamount to destroying the contract." (16 Fed. Cas. at 804)

This Court has also held unconstitutional certain statutes which undertook to create unreasonable presumptions or to provide for an arbitrary shifting of the burden of proof, although the statutes did not necessarily impose *impossible* conditions upon the enforcement of vested rights. See, for

example, *Bailey* v. *Alabama*, 219 U. S. 219, 239; *McFarland* v. *American Sugar Refining Co.*, 241 U. S. 79, 86; *Western & Atlantic R. Co.* v. *Henderson*, 279 U. S. 639, 642; *Manley* v. *Georgia*, 279 U. S. 1, 6. These cases will be discussed more fully later on.[12]

D. The Collector is Personally Liable and Cannot Hide Behind the Sovereign Immunity to Suit.

The present action is against the Collector personally and not against the United States.[13] The personal nature of the action has been repeatedly recognized by this Court. *Sage* v. *United States*, 250 U. S. 33; *Bankers' Pocahontas Coal Co.* v. *Burnet*, 287 U. S. 308; *Smietanka* v. *Indiana Steel Co.*, 257 U. S. 1; *Union Trust Co.* v. *Wardell*, 258 U. S. 537; *Levy* v *Wardell*, 258 U. S. 542; *Patton* v. *Brady*, 184 U. S. 608; *Graham* v. *Goodcell*, 282 U. S. 409. See also *White* v. *Hopkins*, 51 F. (2d) 159, 161, 162 (C. C. A. 5th).

In the case of *Graham* v. *Goodcell*, *supra*, this Court relied upon the nature of the action against the Collector as one against him personally in repudiating the suggestion that Congress could, in the exercise of the sovereign immunity from suit, withdraw the taxpayer's right to sue the Collector on an existing cause of action. In that case the Court had for consideration the constitutionality of Section 611 of the Revenue Act of 1928, a curative statute whereby Congress undertook to ratify certain unauthorized and illegal collections of internal revenue taxes. The Court

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[12] Proposition II(B)(3)(a), pp. 40-42, *infra*.

[13] Even if this action were against the United States, it could be urged that Title VII should be construed as an attempt to impair the *right* itself, as distinguished from the *remedy*, and that it is not to be construed as an attempt to assert sovereign immunity. Cf. *Lynch* v. *United States*, 292 U. S. 571. It could be urged that Congress would not have intentionally denied the right to sue had it realized that the Government's obligation remained. Cf. *Becker Steel Co.* v. *Cummings*, 296 U. S. 74, 79, 80; *United States* v. *Klein*, 13 Wall. 128; *Duke Power Co.* v. *South Carolina Tax Commission*, 81 F. (2d) 513.

held that the particular statute involved in *Graham* v. *Goodcell* was valid as a curative statute.[14] However, the Government had made the argument that Section 611 could be upheld as a withdrawal by Congress of the consent of the United States to be sued. This contention of the Government was repudiated by the Court in the following language (p. 430):

> "The argument of the Government in this respect is not adequate to dispose of the controversy. Some of the present suits were brought against the *collector individually* and were based upon the *right to recover as against him by reason of his illegal acts.* Such an action is personal, and not against the United States. • • • If the Congress did not have the authority to deal by a curative statute with the taxpayers' asserted substantive right, in the circumstances described, it could not be concluded that the Congress could accomplish the same result by denying to the taxpayers all remedy both as against the United States and also as against the one who committed the wrong. See Brinkerhoff-Faris Trust & Sav. Co. v. Hill, 281 U. S. 673, 679, 680." (Italics supplied.)

In a case like the present where an officer takes property under an unconstitutional statute, it is especially clear that he is personally liable. Since Congress had no power to impose the exaction, it could not authorize respondent to col-

[14] The particular statute involved in *Graham* v. *Goodcell* was held valid as a curative statute, upon principles of legislative ratification. Section 21(b) of the AAA, which was added by the amendatory act of August 24, 1935, undertook to legalize and ratify collection of the processing taxes, upon principles similar to those applied in *Graham* v. *Goodcell, supra.* This Court has held that this attempt to legalize processing taxes could have no effect, in view of the lack of congressional power to impose the taxes in the first instance. *United States* v. *Butler,* 297 U. S. 1, 78; *Rickert Rice Mills, Inc.* v. *Fontenot,* 297 U. S. 110, 113. This Court recognized in *Graham* v. *Goodcell* that, unless the statute there involved was effective to legalize the collection, it would be unconstitutional as destroying the taxpayer's vested right of action against the collector for the recovery back of illegally collected taxes.

lect it and the unconstitutional statute can give respondent no protection. It has always been a fundamental principle of our constitutional system that the sovereign immunity to suit cannot shield a government officer from personal liability for damage done under an unconstitutional statute. *Poindexter* v. *Greenhow*, 114 U. S. 270; *Atchison, T. & S. F. R. Co.* v. *O'Connor*, 223 U. S. 280; *Hopkins* v. *Clemson College*, 221 U. S. 636, 642, 643; *Scott* v. *Donald*, 165 U. S. 58; *Cruickshank* v. *Bidwell*, 176 U. S. 73; 81; *Osborn* v. *Bank of the United States*, 9 Wheat. 738, 842-843, 853-854; *Dennison Manufacturing Co.* v. *Wright*, 156 Ga. 789.

In the case of *Poindexter* v. *Greenhow*, 114 U. S. 270, it was held that an action of detinue would lie against a tax collector, who, acting under the mandatory provisions of a state statute, had refused to accept coupons from state bonds in payment of taxes and had proceeded to seize the taxpayer's property. This Court held that the state statute purporting to take away from the coupons the quality of receivability for taxes was unconstitutional. The Court repudiated the suggestion that the suit was "substantially an action against the state", and pointed out the fundamental distinction between suits against the state and suits against state officers acting under an unconstitutional statute. With reference to this point, the Court said (p. 291):

> "This distinction is essential to the idea of constitutional government. To deny it or blot it out obliterates the line of demarcation that separates constitutional government from absolutism, free self-government based on the sovereignty of the people from that despotism, whether of the one or the many, which enables the agent of the State to declare and decree that he is the State; to say 'L'Etat c'est moi.' Of what avail are written constitutions whose bills of right for the security of individual liberty have been written, too often, with the blood of martyrs shed upon the battlefield and the scaffold, if their limitations and restraints upon power may be overpassed with impunity by the very agencies created and appointed to guard, defend

> and enforce them; and that, too, with the sacred authority of law, not only compelling obedience, but entitled to respect? And how else can these principles of individual liberty and right be maintained, if, when violated, the judicial tribunals are forbidden to visit penalties upon individual offenders, who are the instruments of wrong, whenever they interpose the shield of the State? The doctrine is not to be tolerated. The whole frame and scheme of the political institutions of this country, State and Federal, protest against it. • • •."

Scott v. *Donald*, 165 U. S. 58, was an action against South Carolina constables for seizing several packages of whiskey belonging to the plaintiff. The defense was that the whiskey had been imported from other states contrary to the South Carolina Dispensary Act, which recognized as legitimate the manufacture and sale of domestic liquors, but prohibited the importation of liquor from other states. This Court held the Dispensary Act unconstitutional, and further held that the South Carolina officers were personally liable, saying (p. 67):

> "A preliminary question is raised by the proposition that these are in fact suits against the State of South Carolina, and forbidden by the 11th Amendment. This question is sufficiently disposed of by referring to the late case of In re Tyler, 149 U. S. 164, where the conclusion of numerous previous cases was stated to be that where a suit is brought against defendants who claim to act as officers of a State, and, under color of an unconstitutional statute, commit acts of wrong and injury to the property of the plaintiff, to recover money or property in their hands unlawfully taken by them in behalf of the State, or for compensation for damages, such suit is not, within the meaning of the amendment, an action against the State."

Cruickshank v. *Bidwell*, 176 U. S. 73, was a suit to enjoin the enforcement by a collector of customs of a statute providing for the seizure of impure and unwholesome tea. The bill alleged that the act was unconstitutional as delegating

legislative power to the Secretary of the Treasury. It was held that an injunction would not lie since there was an adequate remedy at law, the Court saying (p. 81):

> "The official character of the collector, the provisions of the act, and the regulations of the Secretary of the Treasury in execution thereof would not constitute a defense, if the act were unconstitutional."

The good faith of the officer in such a case is no defense. Even if he honestly believes that the statute under which he acts is valid, the unconstitutional statute "confers no authority" and "affords no protection".[15]

These principles are "essential to the idea of constitutional government". The citizen cannot be left at the mercy of administrative or executive officers acting under unconstitutional statutes. Where the sovereign is immune to suit, the citizen must necessarily rely upon the personal liability of the governmental officers or agents.[16]

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[15] "But a void act is neither a law nor a command. It is a nullity. It confers no authority. It affords no protection. Whoever seeks to enforce unconstitutional statutes, or to justify under them, or to obtain immunity through them, fails in his defense and in his claim of exemption from suit." *Hopkins* v. *Clemson College*, 221 U. S. 636, 644. "An unconstitutional act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed." *Norton* v. *Shelby County*, 118 U. S. 425, 442.

[16] In England also it is recognized that the sovereign immunity does not extend to public officers. See Dicey, "*Law of the Constitution*" (8th Ed.) p. 189, where it is said: "With us every official, from the Prime Minister down to a constable or a collector of taxes, is under the same responsibility for every act done without legal justification as any other citizen. The Reports abound with cases in which officials have been brought before the Courts, and made, in their personal capacity, liable to punishment, or to the payment of damages, for acts done in their official character but in excess of their lawful authority. A colonial governor, a secretary of state, a military officer, and all subordinates, though carrying out the commands of their official superiors, are as responsible for any act which the law does not authorize as is any private and unofficial person."

The risk which these principles impose upon public officers is trivial compared with the danger to constitutional government which would result from the denial of such principles. As a matter of fact, the Collector should not run any great risk of hardship in the present case, since the Government has a moral obligation to reimburse its officers for damages which they may suffer by reason of any action taken in good faith under an unconstitutional statute. No honest government will fail to fulfill this obligation. In any event, since the officer has committed the wrong, it is he and not the injured person who must run the risk.

E. Respondent's Authorities on the Nature of the Action Against the Collector Are Distinguishable.

Respondent has relied upon the decision of this Court in *George Moore Ice Cream Co.* v. *Rose*, 289 U. S. 373,[17] as indicating that the action against a collector of internal revenue is not a personal action. In that case the Court held that the collector's liability for an illegal collection could be enlarged under circumstances where it was apparent that the collector would be indemnified by the Government. Nowhere in the opinion of the Court does Mr. Justice Cardozo question the soundness of the long line of decisions of this Court holding that taxpayers can maintain actions against collectors personally to recover taxes illegally collected. As a matter of fact, the latter principle was reaffirmed by a unanimous court in *Tait* v. *Western Maryland Ry.*, 289

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[17] That was an action against a collector to recover an overpayment of income taxes. The defense was that payment was not made under protest. The Revenue Act of 1924, which was enacted after the payment in question, authorized refunds of internal revenue taxes illegally collected even though payment had *not* been made under protest. The court held, against the contention of the collector, that the 1924 Act should be applied retroactively in suits both against collectors and against the United States, so as to cover payments made prior to its passage, and that the Act as thus construed was constitutional.

U. S. 620, 627, decided *three weeks after* the decision in the *George Moore Ice Cream Co.* case.[18]

It is true that in the opinion of the court in the *George Moore Ice Cream Co.* case Mr. Justice Cardozo said (p. 382):

> "A suit against a Collector who has collected a tax in the fulfillment of a ministerial duty is today an anomalous relic of bygone modes of thought."

However, in making that statement Mr. Justice Cardozo referred to the development of statutory remedies against the Government. In describing a suit against a collector as a "relic of bygone modes of thought", the learned Justice was obviously referring to the fact that for many years the Government had waived its sovereign immunity, thereby rendering it unnecessary during those years to sue the collector. Thus he said (p. 382):

> "There may have been utility in such procedural devices (as suits against collectors) in days when the Government was not suable as freely as now."

Mr. Justice Cardozo did not consider the possibility that in our day our Government would attempt to hide behind sovereign immunity to suit in order to avoid the refund of taxes illegally collected. He was dealing with a case where "A high-minded Government renounced an advantage that was felt to be ignoble". He had just referred to the "fine sense of honor" which had prompted the enactment of the statute making protest an unnecessary condition.

We are now confronted with a totally different situation. The respondent seeks to justify, on the theory of sovereign immunity to suit, an impairment of the remedy, not only against the United States but also against the col-

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[18] In the *Tait* case this Court said: "In a suit for unlawful exaction the liability of a collector is not official but personal. Sage v. United States, 250 U. S. 33; Smietanka v. Indiana Steel Co., 257 U. S. 1; Graham v. Goodcell, 282 U. S. 409, 430."

lector, for the recovery of taxes exacted under an unconstitutional statute. We think it clear that Title VII is properly to be construed as an attempt to impair the *right* itself, as distinguished from the *remedy*, and that it is not to be construed as an attempt to assert sovereign immunity even in suits against the United States.[19] If, however, the respondent is correct in his interpretation of the statute and if the Government is falling back again upon outmoded principles of sovereign immunity, it again becomes necessary for taxpayers to resort to the fundamental principle that a government officer is personally liable for his action under an unconstitutional statute, and must answer in damages to injured parties where the government fails to provide a complete remedy against itself.

There is certainly nothing in the *George Moore Ice Cream Co.* case to indicate that the action against the collector is not a personal action, even though it was considered an *unnecessary* form of proceeding under the state of the law *at that time.*

In the court below respondent urged that this case could be decided in his favor "on the authority alone of *Cary* v. *Curtis*", 3 How. 236.[20] That case is clearly distinguishable from the present case. The statute which the court there

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[19] See footnote 13, p. 18, *supra.*

[20] Although it is clearly distinguishable from the present case, *Cary* v. *Curtis* is of questionable authority. Mr. Justice Holmes, writing the opinion of the court in *Smietanka* v. *Indiana Steel Co.*, 257 U. S. 1, 4, said: "As the law stood before later statutes a collector was liable personally for duties mistakenly collected, • • • But, after an Act of Congress had required collectors to pay over such monies, it was held, *against the dissent of Mr. Justice Story*, that the personal liability was gone. Cary v. Curtis, 3 How. 236. Later statutes however recognize suits against collectors in such cases, and the plaintiff contends that they should be construed to create a new statutory liability attached to the office and passing to successors, • • •. This however is not the language of the statutes and *hardly can be reconciled with the decision of this Court* in Sage v. United States, 250 U. S. 33, and other cases to which we shall refer." (Italics supplied.)

construed as precluding the form of action for money had and received against a collector of customs for excessive duties, was not applied retroactively so as to affect any vested right of action against a collector. The court relied upon the fact that the statute was prospective in operation, and that the terms of the statute "operated as notice to everyone". 3 How. at 242. The Court in *Cary* v. *Curtis*, also pointed out that the effect of the statute there involved was simply to make the particular form of action for money had and received inapplicable in such cases and to leave open to importers all other judicial remedies. 3 How. at 250.[21]

Respondent has also relied upon certain provisions of the customs and tariff acts as authority for upholding the validity of Section 910.[22] It is true that collectors of customs are given a statutory immunity with respect to erroneous rulings or decisions as to the appraisement or the classification of imported merchandise. Cf. 19 U. S. C. A. Sec. 1513. However, no attempt has ever been made to apply such provisions retroactively so as to strike down a vested right of

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[21] In *Cary* v. *Curtis* the court expressly pointed out that the remedies of replevin, detinue and trover were still available to importers with respect to the illegal demands of collectors. 3 How. at 250. In *Tracy* v. *Swartwout*, 10 Pet. 80, it had been definitely held that a collector of customs was liable in trover for retaining possession of goods for excessive duties. See also, *The Conquerer*, 166 U. S. 110, 124, 125.

[22] Cases involving procedures under the Customs Laws are governed by constitutional principles that are inapplicable in internal revenue cases. Customs duties are collected under the congressional power to regulate foreign commerce. *University of Illinois* v. *United States*, 289 U. S. 48. Cf. *Lloyd Sabaudo etc.* v. *Elting*, 287 U. S. 329; *Buttfield* v. *Stranahan*, 192 U. S. 470, 493, 497. In *Origet* v. *Hedden*, 155 U. S. 228, 238, the court said: "Duties imposed under tariff laws are paid in order that goods may be brought into the country, and provisions in respect of their levy and collection are framed in view of the character of the transaction. The finality of the appraisal is a condition attending the importation prescribed by the government as essential to the operation of the system."

action against a collector.[23] Moreover, such provisions in the customs and tariff acts have always been accompanied by other provisions which afforded to importers a substantial remedy with respect to the matters as to which the collector was relieved from liability. Cf. 19 U. S. C. A. Secs. 1514, 1515.[24] There is nothing in the statutory provisions conferring immunity on customs collectors, or any of the decisions thereunder, to indicate that such immunity can be conferred in any case where the collector acts beyond his jurisdiction or under the purported authority of an unconstitutional statute. See *DeLima* v. *Bidwell*, 182 U. S. 1, 177. It is perfectly clear from the authorities discussed above [under proposition I(D)] that an officer cannot be given immunity with respect to exactions made under an unconstitutional act, and there is nothing in any of the cases relied upon by respondent below which even suggests the contrary.

Respondent has also relied on certain authorities as supporting the contention that the action against an internal revenue collector is statutory. Even if the right of action against the collector were statutory, it could not be destroyed once it had vested. See the discussion of the cases of *Ettor* v. *Tacoma*, and *Steamship Company* v. *Joliffe*, *supra*, pp. 13-14, where rights of action were held indestructible, although they depended necessarily upon statutes and would not have arisen at common law. However, "The right to sue the Collector for an unjustified collection was given by the common law",[25] and is still spoken of as a

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[23] Immunity was first conferred upon customs collectors in such cases by Section 25 of the Customs Administration Act of June 10, 1890, c. 407, 26 Stat. 131. Express provision was made in Section 29 of the Act against the impairment of existing causes and rights that accrued under prior laws.

[24] It will be shown later under propositions II(B) and II(C), *infra*, pp. 29 and 51, that Title VII of the 1936 Revenue Act does not afford any real remedy, judicial or administrative.

[25] *United States* v. *Emery, Bird, Thayer R. Co.*, 237 U. S. 28, 31.

common law right modified by statute, and not as a statutory right.[26]

II.

Title VII of the Revenue Act of 1936 Unconstitutionally Impairs Petitioner's Vested Right Against the Collector.

A. Section 910 is Void as Destroying the Collector's Personal Liability, Regardless of Whether any Alternative Remedy Against the United States is Provided.

We have shown under our first main proposition (I) that petitioner had a vested right of action against the collector personally, which could not be impaired under the Fifth Amendment. Section 910 of the Revenue Act of 1936 directly and unequivocally attempts to destroy the collector's personal liability. It would seem clear that Section 910 would thus be void under the Fifth Amendment, regardless of whether any alternative remedy is provided against the United States. It is true that Title VII purports to afford a special statutory remedy against the United States with respect to taxes collected under the unconstitutional AAA. However, since the right of action against the collector personally had already become vested, that right cannot be destroyed by providing an alternative remedy against the United States. A vested right of action against one individual cannot be destroyed by substituting a right of action against another individual.[27] It would seem even clearer that a vested right of action against an individual cannot be destroyed by substituting a right of action against the Government, which may be cut short at any time by the Government's withdrawal of consent to suit. A remedy

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[26] *Sage* v. *United States*, 250 U. S. 33, 37. Cf. *DeLima* v. *Bidwell*, 182 U. S. 1, 177 *et seq.*

[27] Cf. *International Steel & I. Co.* v. *National Surety Co.*, 297 U. S. 657.

against the Government is always speculative and uncertain, and often illusory.

We submit therefore that Section 910 is invalid even though a remedy, no matter how adequate, is provided against the United States. We do not rest our case here, however. We undertake to show, in the argument which follows in propositions II(B) and II(C), that Title VII does not provide any real remedy whatsoever, either against the United States or against the Collector.

B. The Remedy Provided by Title VII is Grossly Inadequate and Illusory Because of the Uncertainty of Terms and Impossibility of Proof.

It has been shown above that Congress cannot destroy the vested right which petitioner had to recover amounts unconstitutionally exacted from it, certainly unless some fairly equivalent right is set up in its place.[28]

We demonstrate under this proposition, II(B), that the conditions upon recovery imposed by Section 902, even if otherwise constitutional, are so vague and uncertain as to be meaningless, and that any court, in order to give them meaning, must exercise a legislative and not a judicial function; that any meaning which the respondent will suggest involves an inherent impossibility of proof; that the arbitrary presumption established by Section 907 does not remove such impossibility, but on the contrary tends, as it was doubtless intended to do, to establish by presumption a conclusion not in accord with the actual facts; that therefore the ostensible right of recovery given by the act is only an illusion, and the taxpayer is actually left without any remedy or redress whatsoever for the wrong which has been done by the collection of these illegal taxes.

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[28] Petitioner has contended above that the right against the Collector cannot be destroyed even if a substitute fairly equivalent is set up in its place.

1. *Section 902 is so Vague and Uncertain that it is Meaningless, and Therefore Affords No Remedy.*

The point we make under this subheading is that Section 902 is so unintelligible that it affords no remedy, because it is impossible to know what the remedy embraces, and a court, in order to give the section any definite meaning, would be required to legislate.

Section 902 purports to make the right of processors to recover any amount of processing taxes illegally collected depend upon proof by the processor—

> "That he bore the burden of such amount and has not been relieved thereof nor reimbursed therefor nor shifted such burden, directly or indirectly, (1) through inclusion of such amount by the claimant, • • • • in the price of any article with respect to which a tax was imposed under the provisions of such Act (i. e., AAA), • • • (2) through reduction of the price paid for any such commodity; or (3) in any manner whatsoever • • •."

The Government has not yet attempted to give any precise definition to the terms of Section 902.[29] It will probably be urged that the *general purpose* of the Section is to deny recovery where processors have shifted the economic

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[29] No attempt was made to give any official interpretation to Section 21(d)(1) of the AAA as amended, quoted in the Appendix, *infra*, p. 99. Even in the respondent's brief in this Court in *Rickert Rice Mills, Inc.* v. *Fontenot*, the Government suggested with equal seriousness various interpretations of the language of Section 21(d)(1), which are as wide apart as the poles. The Government stated: "It may be that the courts will hold that the tax is passed on when the selling price of the product equals its cost, plus the tax. Or the theory may be adopted that an absence of an increase in selling price of the product and an absence of a decrease in purchase price of the rough rice after the Act took effect, other costs being constant, is persuasive proof that the tax was not shifted. Or a comparison with a fair profit of pre-tax periods may possibly furnish the test." (Br. p. 48.)

burden of the tax,[30] in the sense in which those terms are used by economists. Even if Section 902 should be construed as expressing this general purpose, it does not set forth a sufficiently precise and definite legislative standard for the determination of the processor's right to a refund.

Economists would say *generally* that a processor has shifted the tax burden where he was able to charge more for his finished products or to pay less for his raw commodities than the prices that would have prevailed for such products and commodities if no processing tax had been imposed. See the introduction to Seligman, *"The Shifting and Incidence of Taxation"* (5th ed. 1926). See also Hunter, *"Outlines of Public Finance"* (1926), pp. 154 et seq.; Brown, *"The Economics of Taxation"* (1924), pp. 9-13, 56 et seq.; Lutz, *"Public Finance"* (2d ed. 1929), pp. 317 et seq. If the terms have this general meaning, the answer to the question as to whether a taxpayer has shifted the tax burden will depend upon a comparison between actualities or realities on the one hand, and imaginary or ideal conditions on the other. *Actual prices* must be compared with the *"prices that would have prevailed"* under other circumstances. As most economists would define the shifting of tax burdens, actual circumstances are to be altered so as to suppose that the tax had never been imposed, in order to furnish a comparative basis for determining the extent of the shifting of any tax burden.

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[30] Section 902 refers not only to *shifting*, but to the processor being *"relieved"* from the amount of the tax *reimbursed* for the amount of the tax. We do not even consider the great complications which these other phrases add, but discuss the Section as though it used only the term *shifted the burden of the tax*.

No one has suggested that the restrictions of Section 902 are confined to cases where the tax has been dealt with as a separate item in dealings between the processor and those with whom he deals, as was the case with Section 424 of the Revenue Act of 1928, upheld in *United States* v. *Jefferson Electric Mfg. Co.*, 291 U. S. 386, discussed under proposition II(D), *infra*.

However, it would be necessary to have a more precise definition if it is to be possible for processors to know the real meaning of the proposition which they are required to prove in order to qualify for a refund. Does the expression "shifting the tax burden" signify that a comparison is to be made between actual prices and the imaginary prices that would have prevailed if the tax had not been imposed and if *all other circumstances* are supposed to have happened as they actually did happen? If we are to suppose other circumstances to be altered in the imaginary state, what other circumstances are to be considered? Are we to imagine that the processing tax was never imposed, and *also* that benefit payments were not made to farmers under the AAA? Are we to imagine also that the production control program of the AAA was never put into effect? Or are we to imagine that it was put into effect by payments from some other source or by some other device?[31] All such circumstances affected the processors' prices. If the meaning of the term "shifting the tax burden" is to depend upon a comparison of actual and imaginary prices, we must know what are the particular circumstances to be considered in setting up the imaginary state of facts which is to furnish the standard.

Section 902 does not give any definition of the term "shifting the tax burden", and the term, even as used by economists, is so vague, uncertain and indefinite that it is impossible to know what the section provides. Section 902 cannot be held to afford any remedy, because processors cannot know *what is the proposition to be proved*, without regard to the possibility or impossibility of proof of any particular proposition. The presumption created by Section 907 of Title VII does not cure the uncertainty of Section 902; it does not purport to serve as a definition of the terms used in Section 902, but only to supply by arbitrary con-

[31] Cf. Bankhead Cotton Control Act (Act of April 21, 1934, c. 157, 48 Stat. 598, 7 U. S. C. A. Secs. 701 *et seq.*); Amendment to Soil Conservation Act (Act of Feb. 29, 1936, c. 104, 49 Stat. 1148).

clusion the unavailable and non-existing proof required by section 902.

If this Court should now be inclined to remedy the uncertainty by giving a definite and precise meaning to the terms used in Section 902, it could not do so without legislating. Since the section is open to at least four or five or more possible meanings, any one of which is as good as the other, this Court clearly cannot by *construction* give it only one meaning to the exclusion of the others. Such a process is a process of legislation and not of construction and is forbidden to the courts under our system of separation of powers. Cf. *Yu Cong Eng* v. *Trinidad*, 271 U. S. 500. It is just as though Congress had declared in general terms that in its opinion some unfairness might be involved in refunds to processors by reason of dealings between processors and their customers, and had provided that the court should determine what in its opinion should fairly be done to remedy the situation, and that when the court made the determination, such determination would have the effect of law, and refunds of unconstitutional exactions could be had only by complying with the court's pronouncement.

Compare the cases wherein this Court has held that a "statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law". *Connally* v. *General Construction Co.*, 269 U. S. 385, 389. See also *Smith* v. *Cahoon*, 283 U. S. 553, 564; *Champlin Refining Co.* v. *Corporation Com.*, 286 U. S. 210, 243; *United States* v. *L. Cohen Grocery Co.*, 255 U. S. 81, 89, 90. These fundamental principles apply with respect to purely civil as well as criminal statutes. *A. B. Small Co.* v. *American Sugar Refining Co.*, 267 U. S. 233, 239; *Cline* v. *Frink Dairy Co.*, 274 U. S. 445, 463.

2. *Section 902 Imposes an Impossible Burden of Proof.*

We have indicated at page 31 above what economists mean *generally* by the term "shifting the burden of the tax" and we have pointed out that there is no agreement as to any *precise* definition of terms. Without even attempting any precise definition, the purposes of the present argument will be fully served if we regard the term "shifting" in the *general* sense used by economists. As thus used,

> A processor would be said to have *shifted* the processing tax *forward* if he had been able to charge more for his finished product because of the tax than he would have been able to charge if the tax had never been imposed.
>
> A processor would be considered as having *shifted* the tax *back* if he had been able to pay less for the raw commodity because of the tax than he would have had to pay if the tax had never been imposed.

Any such proposition necessarily involves an inherent impossibility of proof.[32] The question as to how much a cotton mill *would have paid* for the raw cotton, and how much it *would have received* for its finished goods, in the absence of

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[32] In the discussion of impossibility of proof petitioner has assumed that it is possible to determine the amount of processing tax actually paid on each article of goods sold just as if the processing tax had been a sales tax based on the sales price of the goods. However, this assumption is contrary to fact. *It is clearly impossible to determine how much tax is paid on each article of goods processed from a particular bale of cotton.* The contents of a bale of cotton are not uniform. Cotton of varying types and grades, including marketable and unmarketable waste, comes from a single bale of cotton. The different products which the single bale of cotton produces are of widely different values. The law does not prescribe how the tax of 4.2¢ per pound on the bale is to be allocated between the different products, whether on the basis of weight, value, or a combination of both, or upon some other basis. It seems unnecessary to develop this argument of impossibility, because it is so clearly impossible to determine whether the burden of tax with respect to any article has been shifted, even if it can be known how much tax was actually paid on the article.

the processing tax, "is a problem that no human ingenuity could solve", to use the language of this Court in *International Harvester Company* v. *Kentucky*, 234 U. S. 216, 223. In that case this Court had under consideration a Kentucky statute which made illegal all agreements for the purpose of controlling the price of harvesters, etc., and of enhancing it above the "real value". The Kentucky cases had declared the "real value" to be "market value under fair competition, and under normal market conditions." In holding that it was impossible to ascertain what the market value would have been under fair competition and normal market conditions in a case where it was assumed that such competition and conditions did not exist, the Supreme Court, through Mr. Justice Holmes, said (pp. 223, 224):

> "The reason is not the general uncertainties of a jury trial but that the elements necessary to determine the imaginary ideal are uncertain both in nature and degree of effect to the acutest commercial mind. The very community, the intensity of whose wish relatively to its other competing desires determines the price that it would give, has to be supposed differently organized and subject to other influences than those under which it acts * * *."
>
> "* * * To compel them to guess on peril of indictment what the community would have given for them if the continually changing conditions were other than they are, to an uncertain extent; to divine prophetically what the reaction of only partially determinate facts would be upon the imaginations and desires of purchasers, is to exact gifts that mankind does not possess."

The case of *Collins* v. *Kentucky*, 234 U. S. 634, which also arose under a Kentucky Anti-Trust statute, involved a question as to the legality of a combination of tobacco growers. Under the statute the legality of the combination depended upon the test as to whether it raised prices above the "real value". In pointing out the impossibility of as-

certaining what was the "real value", Mr. Justice Hughes, writing the opinion of the court, said (p. 638):

> "He was thus bound to ascertain the 'real value'; to determine his conduct not according to the actualities of life, or by reference to knowable criteria, but by speculating upon imaginary conditions and endeavoring to conjecture what would be the value under other and so-called normal circumstances with fair competition, eliminating the abnormal influence of the combination itself, and of all other like combinations, and of still other combinations which these were organized to oppose. The objection that the statute, by reason of its uncertainty, was fundamentally defective, was as available to Collins as it was to the Harvester Company."

In a similar situation, where shippers seek to recover excessive freight charges which they have been required to pay, the courts have held that the carriers cannot defend on the ground that the burden of freight rates has been shifted to consignees by reason of increased prices charged by the shippers. In reaching this result, the courts have recognized the inherent impossibility of determining whether, and to what extent, the freight burden has been shifted. In the case of *Southern Pacific Co.* v. *Darnell-Taenzer Lumber Co.*, 245 U. S. 531, which involved this situation, Mr. Justice Holmes, writing the opinion of the Court, said (p. 534);

> "Behind the technical mode of statement is the consideration well emphasized by the Interstate Commerce Commission, of the endlessness and futility of the effort to follow every transaction to its ultimate result. 13 I. C. R. 680."[11]

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[11] In *Burgess* v. *Transcontinental Freight Bureau*, 13 I. C. C. 668, 680, the Commission said: "If complainants were obliged to follow every transaction to its ultimate result, and to trace out the exact commercial effect of the freight rate paid, it would never be possible to show damages with sufficient accuracy to justify giving them." In *Kindelon* v. *Southern P. Co.*, 17 I. C. C. 251, 255, the

The Congressional Committees reporting Section 902 recognized that it was no easy task to determine whether processing taxes had been passed on. The Committees said:

> "The question as to whether processing taxes were passed on, however, involves *extremely complicated* economic and accounting considerations." *Senate Rep. No. 2156*, 74th Cong. 2nd Sess., p. 33; *House Rep. No. 2818*, 74th Cong. 2nd Sess., p. 2. (Italics supplied).

However, the Committees do not give any explanation, simple or complicated, as to how a determination can be made of the extent to which the processing tax burden has been shifted.[34]

The insuperable problem of determining whether the economic burden of this tax has been shifted to purchasers was recognized in the *Report of the President's Cabinet Committee on the Cotton Textile Industry* (1935), where it was said:

> "It is impossible to disentangle the effect of any individual element of cost upon selling price." *Senate Doc., No. 126*, 74th Cong. 1st Sess., p. 142.

The same insuperable difficulty of proof is involved in seeking to determine whether the tax burden has been shifted back to the producer.

Both in his purchases and his sales, a cotton processor is dealing in a highly competitive market. He pays substan-

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Commission said: "The shipper who has been charged an unlawful rate, • • • is entitled to repayment without the imposition of the *impossible task* upon the Commission of ascertaining the ultimate profits accruing from the business of the shipper." (Italics supplied.) Cf. *New York, New Haven & H. R. Co.* v. *Ballou & Wright*, 242 Fed. 862.

[34] It is true that a statutory presumption for solving the question is set up in Section 907 of the Act, but it will be shown later that such presumption is arbitrary and unreasonable and does not furnish a fair test for even approximating the extent to which the tax burden has been shifted in any case. See proposition II(B)(3)(a), *infra*, p. 40.

tially the market price for cotton and sells his finished goods at substantially the market price. It is obvious that a cotton processor cannot deduct any amount from the market price of cotton if he wishes to buy, nor can he add anything to the market price of finished goods if he wishes to sell. As was stated by the United States Tariff Commission in its *Report to the President on Cotton Cloth* (Government Printing Office, 1936):

> "The average cotton manufacturer has little more control over his marketing organization than has the individual cotton farmer. The price is fixed in both cases by a marketing mechanism operating quite independently of the individual producers, and they must take or leave price quotations at a particular time regardless of their cost of production." *Report No. 112*, 2nd Series, p. 92.

A processor can show what these prices were at any time before and at any time during the processing tax period, but he cannot show whether any difference in price during the processing tax period, as compared with the prices obtaining before the tax was imposed and after the tax was eliminated, is due to the tax.

The prices of raw materials and the prices of finished products are determined by so many complicated factors and the effect of each of these factors varies so much from time to time, that it is impossible even to attempt a quantitative measurement of the effect of any factor upon price at any particular time, or to know what the price would have been if that factor had been eliminated. Economists do not undertake to explain more than "what will happen in the long run". Bastable, "*Public Finance*," p. 367.

Demand may be very stable or it may be highly elastic. A small change in price may effect a great increase or decrease in demand or a shift to or from competitive products, as from cotton to jute or rayon, and this may vary greatly from time to time depending upon the whims of public taste. Prices are greatly affected by the money market and

credit conditions; by the optimism or pessimism of the public, whether or not based upon sound reason; by improvements in quality or in production methods of cotton goods and competitive products; by the general market and markets in related industries; by wages and conditions of employment; by Government spending; by unemployment and old age relief; and by countless hundreds of other factors upon which no numerical value can be placed. All of these make it impossible to make even an approximate guess as to the effect on prices of any single factor such as NRA wages and hours, soldiers' bonus, or the imposition or ending of the processing tax.

The Department of Agriculture recognized the complexity of the question involved and admitted that price comparisons do not afford the answer. In the *Report of Administration of the Agricultural Adjustment Act, May 1933 to February 1934*, the Department of Agriculture said (p. 220):

> "The question 'who pays the processing tax' cannot be answered by a mere examination of the change in producer, wholesale and retail prices and in the final spread between them. It is true that commonly this question is answered in this partial way without taking into account such facts as the volume of supplies, the rate of consumption, the amounts paid by consumers, the total returns to producers, the benefit payments made to producers from the proceeds of the processing tax, the stimulus to general business activity through increased farm purchasing power, and the improvement in the credit structure of the country through the enhancement of agricultural values."

And yet in order to recover under Title VII, a processor apparently would have to show what price he would have paid for cotton in the open market if the processing tax had not been imposed and must also show at what price he would have sold his goods if the processing tax had not been imposed. The most able economists with the help of all the

experts which the Government could furnish could do no more than *conjecture* as to what the market price of cotton or cotton goods would have been upon such a non-existent state of facts.[35]

3. Title VII is Unconstitutional in Arbitrarily Shifting the Burden of Proof and Creating an Unreasonable Presumption.

Congress, recognizing the impossibility of proof as to the shifting of the tax burden inherent in Section 902, sought to remedy that objection by creating in Section 907 a presumption for determining the extent to which the burden of the processing tax has been borne by the processor. We shall undertake to show below under (a) that this statutory presumption is arbitrary and unreasonable and therefore invalid; and under (b) that, apart from the statutory presumption, Title VII is arbitrary and unreasonable in shifting to the processor the burden of negativing the existence of all facts upon which the so-called defense of unjust enrichment might be based.

(a) *The presumption created by section 907 is arbitrary and unreasonable.*

The presumption created by Section 907 is based upon a comparison between the manufacturing margin (that is, the difference between the cost of the raw commodity to the processor and the selling price of the finished goods)[36] dur-

[35] District Courts, in granting injunctions against collection after the passage of Section 21(d), recognized the soundness of these claims of impossibility of proof, and their conclusions are equally applicable to Section 902. See, for example, *Baltic Mills Co.* v. *Bitgood*, 12 F. Supp. 132, 134; *Grosvenor-Dale Co.* v. *Bitgood*, 12 F. Supp. 416, 417, 418. A number of the District Court decisions were not reported.

[36] The term "margin" as used in Section 907 is a word of art and does not mean "manufacturing margin". "Margin" as used in Section 907 is determined by deducting from the gross sales value of all articles processed during a specified period the cost

ing the processing tax period, and the manufacturing margin during a specified "period before and after the tax". The "period before and after the tax", which is specified in Section 907, is the twenty-four months immediately preceding the effective date of the processing tax, August 1, 1931, to July 31, 1933, inclusive, and the six months, February to July, 1936, inclusive. We shall refer to this period as the "comparative period".

The theory of Section 907 is that the manufacturing margin would have been the same during the processing tax period, if the tax had never been imposed, as it was during the comparative period. Based upon this hypothesis, it would be presumed under Section 907 that a processor shifted the tax burden to others to the extent that the processor's manufacturing margin was greater during the tax period than during the comparative period. The processor would be presumed to have borne the entire burden of the tax in any case where his manufacturing margin during the tax period was not greater than during the comparative period.

If the conclusion which the presumption requires from the facts proved is so unreasonable as to amount to a purely arbitrary mandate, it is clear that the presumption is unconstitutional. This Court has time and again stricken down unreasonable presumptions. It has said that "a presumption that is arbitrary or that operates to deny a fair opportunity to repel it", violates the requirement of due process, *Western & A. Railroad* v. *Henderson*, 279 U. S. 639, 642; that "a constitutional prohibition cannot be transgressed indirectly by the creation of a statutory presumption any more than it can be violated by direct enactment", *Bailey* v. *Alabama*, 219 U. S. 219, 239; and that a legislative

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of the commodity processed during the period and the processing tax paid with respect thereto. However, the basic principles of Section 907 are explained in the text by reference to "manufacturing margins", a term in common use among economists and statisticians.

presumption "must not, under guise of regulating the presentation of evidence, operate to preclude the party from the right to present his defense to the main fact thus presumed", *Mobile, J. & K. C. R. Co.* v. *Turnipseed*, 219 U. S. 35, 43. And in the case of *McFarland* v. *American Sugar Refining Co.*, 241 U. S. 79, this Court held invalid a state statute creating a presumption of participation in a monopoly based upon the systematic payment of lower prices within the state for sugar than were paid outside the state. Speaking through Mr. Justice Holmes, the Court said (p. 86):

> "As to the presumptions, of course the legislature may go a good way in raising one or in *changing the burden of proof*, but there are limits. It is 'essential that there shall be some *rational connection between the fact proved and the ultimate fact presumed*, and that the inference of one fact from proof of another shall not be so unreasonable as to be a purely arbitrary mandate' ". (Italics supplied).

It is submitted that the presumption created by Section 907 is invalid upon the basis of the foregoing authorities. Assume that the manufacturing margin of a particular cotton mill during the processing tax era was greater than its margin during the specified comparative period. Proof of such fact cannot conceivably support the inference that the processing tax burden was shifted by the mill to others.[37] Yet such would be the presumption under Section 907. To use the language of this Court, there is no "rational connection between the fact proved and the ultimate fact presumed."

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[37] It has been shown in the discussion under proposition II(B)(2), *supra*, that no human ingenuity can discover the numerical effect of any particular element of cost upon the price of cotton or the price of cotton goods. The same impossibility, of course, is encountered in any attempt to determine the numerical effect of any particular element of cost upon manufacturing margins.

The fundamental hypothesis on which the statutory presumption is based is that the manufacturing margin would have been the same during the processing tax period if the tax had never been imposed as it was during the comparative period. However, the reports of Government economists and investigators recognize that manufacturing margins are affected by numerous complicated circumstances, and that there is no such thing as a constant or normal margin, but that the margin of manufacture fluctuates widely from year to year.

In the *Report of the Chief of Bureau of Agricultural Economics* (1935), (Government Printing Office), it is said (p. 24):

> "The importance of the margin between prices received by farmers and prices paid by consumers for food and other farm products has increased since 1934 because of increased wages and increased costs of materials used in the transportation, processing, and marketing of farm products, because of processing taxes which have added to processors' costs, and because of changes in marketing methods (including the adoption of marketing agreements in several industries) which have affected costs and charges for the services needed in getting foods and other agricultural products from the farm to the consumer."

In the *Report of the President's Cabinet Committee on the Cotton Textile Industry* (1935), it was clearly recognized that there is no fixed margin in the cotton textile industry. The following statement is taken from the report:

> "Indeed, the price relationships during periods of rapidly changing prices, such as characterize cyclical fluctuations of business, indicate that a fixed margin does not obtain. * * * It is impossible to disentangle the effect of any individual element of cost upon selling price." *Senate Doc. No. 126*, 74th Cong., 1st Sess., p. 142.

The Department of Agriculture itself recognized that the incidence of the processing tax could not be determined from the changes in manufacturing margin or spread. In the *Report of Administration of the Agricultural Adjustment Act, May 1933 to February 1934*, it was said (p. 220):

> "The question 'who pays the processing tax' cannot be answered by a mere examination of the change in producer, wholesale and retail prices and in the final spread between them."

The Department of Agriculture further admits that the manufacturing margin of cotton mills would have increased after August 1, 1933, even if the processing tax had never been imposed. In the *Report of Administration of the Agricultural Adjustment Act, May 1933 to February 1934*, the Department says, with reference to the cotton textile industry (p. 236):

> "There was a fairly consistent downward trend in cotton manufacturers' margins from 1925-26 to 1932-33. A few months before the processing tax went into effect on August 1, 1933, these margins began to widen and in August, 1933, were greater than at any other time during the period covered by the data studied. *But the margins would have been increased during these months even if no tax had been imposed.* This is partly because cotton mills were operating under extremely low margins during most of the 1932-33 season, partly because *demand conditions made such an increase particularly easy to accomplish at that time*, and partly because costs of mill operation were greatly increased at about the same time the processing tax went into effect." (Italics supplied.)

While we cannot assign numerical values to any of the factors, we do know that a number of important circumstances other than the imposition of the processing tax which occurred in the tax period would have tended to increase manufacturing margins. For example, hours were

shortened and wages increased under the NRA; the soldier bonus was paid; the dollar was devalued and credit inflated; large sums were spent on public works and for relief; farm incomes were increased through benefit payments; trading on the stock and commodity exchanges increased; droughts and floods reduced surpluses and increased prices; business in the textile and various other lines was good.

On the other hand, it is common knowledge that the larger part of the comparative period represented the lowest ebb of the depression, and that the textile business was most seriously affected. It was pointed out in the *Report of the Department of Agriculture*, quoted above, that "cotton mills were operating under extremely low margins during most of the 1932-1933 season". And in the *Report of the President's Cabinet Committee on the Cotton Textile Industry*, it was stated that "In 1930, 1931, and 1932 the cotton textile industry as a whole showed serious losses". *Senate Doc. No. 126*, 74th Cong. 1st Sess., p. 141.

With these facts before it, it is difficult to see how the Department of Agriculture could in good faith propose,[38] as a test for determining the extent to which the processing tax had been shifted, a presumption based almost entirely upon the two-year period preceding the imposition of the tax. And yet that is the test which Section 907 prescribes.

Senator George said in the Senate with reference to this comparative period:

> "This period of 2 years, of course, as everybody knows, was when the country was at the very bottom of the depression. Necessarily the formula would work out against all claimants for refunds." *Cong. Rec.*, 74th Cong., 2nd Sess., Vol. 80, Part 8, p. 9078.

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[38] The paternity of the presumption brought into the law by Section 907 is unmistakable. The presumption of Section 907 was suggested by Secretary Wallace to the Senate Finance Committee when the Committee had under consideration the Revenue Bill of 1936. See Hearings before the Committee on Finance, United States Senate, 74th Congress, 2nd Sess., on H. R. 12395, pp. 851-853.

As a matter of fact, Congress itself recognized that the two-year period preceding the imposition of the processing tax could not be used as a fair basis for determining whether the processing tax had been shifted. In Title III, relating to the windfall tax, where Congress set up a similar presumption for determining shift, it rejected the two-year period and set up a six-year period "in order to give more equitable comparisons". The two-year period was also provided for in the first draft of Title III, relating to windfall tax, but the House extended the period to five years. In recommending the six-year period finally adopted, the Senate Finance Committee said:

> "In order to give more equitable comparisons, the representative period for determining the taxpayer's basic average profit margin (used in the prima-facie computation of the extent to which he shifted the burden of the tax) has been lengthened from 5 to 6 years." *Senate Rep. No. 2156,* 74th Cong. 2nd Sess., p. 25.

The Government in its brief in the Circuit Court of Appeals in the case of *Kingan & Co.* v. *Smith, Collector* (C. C. A. 7th, No. 6118), involving the windfall tax, *calls particular attention to the use of the six-year comparative period in Title III, and its discussion clearly indicates that the period from 1931 to 1933 would not be fair under any circumstances.* The Government there said (Br. p. 87):

> "To insure that this comparison is wholly fair to the taxpayer, the representative period consists of the six taxable years prior to the imposition of the tax. Section 501(f)(1). In the case of the appellant this includes two years (1927-1928, 1928-1929) at the peak of the business cycle, two of receding activity (1929-1930, 1930-1931) *and two at the trough of the cycle* (1931-1932, 1932-1933)." (Italics supplied.)

If the six-year period is necessary for a fair comparison in determining shift in the case of the windfall tax, why is the period at the trough of the depression considered fair in

connection with refunds of processing taxes? Perhaps it was considered that in the imposition of a recapture tax, some of the fundamentals of fairness must be adhered to, whereas in order to retain taxes illegally exacted, no consideration need be given to the fairness of a presumption, and any presumption can be adopted which will result in the retention by the Government of the illegal exaction.[39]

It should be noticed also that Section 907(e) states the condition upon which the presumption created by Section 907(a) may be rebutted. It is provided in subsection (e) that the presumption created by subsection (a) may be rebutted "by proof of the *actual extent* to which the claimant shifted to others the burden of the processing tax". Subsection (e) indicates a number of circumstances which might be included in such proof; but in order to rebut the presumption, subsection (e) requires "proof of the *actual extent* to which the claimant shifted to others the burden of the processing tax". The impossibility of producing such proof in any case has been demonstrated under a preceding heading. In providing that the presumption can be rebutted only by proof which is inherently impossible, subsection (e) in effect makes the presumption of subsection (a) an irrebuttable and conclusive one. Such a presumption is clearly repugnant to the due process clause of the Fifth Amendment. *Heiner* v. *Donnan*, 285 U. S. 312; *Schlesinger* v. *Wisconsin*, 270 U. S. 230.

It is even provided in Section 907(e)(2) that if a claimant has processed products, in addition to the commodity with respect to which the processing tax was imposed, the Commissioner may determine that the burden of the tax on

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[39] Other inexplicable discrepancies appear in the presumptions set up in the supposedly complementary titles. Both titles use actual cost, but Title III uses actual selling prices, while Title VII uses theoretical selling price. Why should such differences appear in presumptions set up in the same act to prove the same facts, unless, as we contend, the presumptions were purely arbitrary and known to have no relation to the facts presumed?

taxable commodities has been shifted, in whole or in part, by means of transactions involving non-taxable products. It is provided in such a case that the same presumption, based upon comparative manufacturing margins, should be applied to determine *the extent to which the tax burden has been shifted in transactions involving non-taxable products.* This provision is further evidence of the grossly arbitrary character of the presumption created by Section 907.

(b) *Even if a defense of unjust enrichment were available, it would be unreasonable under the circumstances to transfer the burden of proof with respect to such subject to the processor.*

Even if the doctrine of unjust enrichment could constitutionally be extended by statute so as to bar recovery of a tax merely because the economic burden of the tax might have been passed on, the burden of proof as to the existence of such defense would in any event rest normally upon the defendant who asserts it. Title VII, however, shifts to the taxpayer the burden of negativing the existence of the facts upon which the defense would be based. This shifting of the burden of proof in a situation such as is here presented is so arbitrary and unreasonable that it lacks the essentials of due process. And its constitutionality clearly is not saved by the arbitrary presumption set up by Section 907.

The Government urged before this Court in the case of *Rickert Rice Mills, Inc.* v. *Fontenot, supra,* that it is reasonable to place such a burden of proof upon the taxpayer as the party "who has peculiar knowledge of the facts and who has those facts within his control". (Respondent's brief, p. 37). *As a matter of fact, none of the more important facts are within the taxpayer's knowledge or control.* Whether the economic burden of a tax has been shifted, in the sense in which economists generally use the

term, depends not upon facts relating to particular transactions of sale or to the operations of a particular taxpayer, but upon a comparison of the market price actually paid by the taxpayer for lint cotton and the market price actually received by him for finished goods with the *prices which would have prevailed* for the raw commodity and the finished goods if the processing tax had not been imposed. While clearly nobody can establish these facts, the Government is in a much better position than an individual mill to attempt such proof as can be made. The individual cotton mill, unlike the Government agencies, does not have access to the records of its competitors and does not have the facilities which the Government has for gathering statistical data and information from national and world markets. The only facts which the individual taxpayer has in his possession relate to his own purchases and sales, and this is a negligible part of the proof required.

Congress was not content simply to give to the Government by statute a right which it had not had before to defend against recovery of unconstitutional exactions by showing that the economic burden of the exactions had been passed on or back by the taxpayer, but in addition went further and relieved the Government from the burden of proving the facts to support the defense. It was fully recognized that the proof required was highly speculative and difficult, if not impossible, to adduce, and that in many instances where the tax burden may actually have been passed on, the Government could not make the required proof. The simple expedient was therefore adopted of transferring the impossible burden to the processor, thus insuring the retention by the Government of amounts which were absorbed by the processors as well as amounts which were shifted.

If Title VII were otherwise constitutional, it is submitted that this Court would be compelled to hold that Title VII constitutes an unconstitutional restriction upon the taxpayer's vested right by reason of placing this unreasonable

burden of proof upon the taxpayer. In the court below the Government sought to justify the shifting of the burden of proof upon the basis of authorities holding that the Commissioner's assessment of a tax is prima facie correct, and that on appeal to the Board of Tax Appeals the taxpayer must overcome this presumption.[40]

There is no analogy between a case involving the question whether a taxpayer overpaid his tax and a case where sums admittedly have been unconstitutionally exacted from a taxpayer, and an effort is made by retroactive legislation to bar recovery of the sums thus overpaid by the creation of a statutory defense of alleged unjust enrichment such as is provided in Title VII. In connection with the collection of taxes, the presumption of administrative correctness has been considered necessary to the proper administration of the tax law; and it is on the whole a fair rule, because most of the facts to be proved generally are facts largely within the knowledge of the taxpayer. On the other hand, it is clear that no public policy requires that the burden of negativing a retroactively created statutory defense to a vested right of action for unconstitutional exactions should be placed upon the taxpayer where the proof required is of facts not within his knowledge, and where the proof is most difficult and speculative, if not impossible, to adduce. The sanctioning of such a rule would permit all claims for unconstitutional exactions to be defeated merely by the imposition of burdens of proof which could not be met.

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[40] The Government cited the following cases: *United States* v. *Rindskopf*, 105 U. S. 418; *Fidelity & Columbia Trust Co.* v. *Lucas*, 7 F. (2d) 146 (W. D. Ky.); *Wickwire* v. *Reinecke*, 14 F. (2d) 956; (C. C. A. 7th); *Mimnaugh* v. *United States*, 66 Ct. Cls. 411, cert. den. 280 U. S. 563; *Avery* v. *Commissioner*, 22 F. (2d) 6 (C. C. A. 5th); *Commissioner* v. *Field*, 67 F. (2d) 876 (C. C. A. 2d); *Westlake Public Market* v. *Commissioner*, 69 F. (2d) 291 (C. C. A. 9th); *Stiles* v. *Commissioner*, 69 F. (2d) 951 (C. C. A. 5th). But compare *Helvering* v. *Taylor*, 293 U. S. 507.

C. Even If No Impossibility of Proof Were Involved, There is No Legal, Equitable or Moral Basis for the Restrictions Imposed by Title VII.

The Government attempts to justify Section 902 of the 1936 Revenue Act as a Congressional recognition of the equitable doctrine of unjust enrichment, coupled with a shifting of the burden of proof on the subject to the processor. The same explanation was offered by the Government with reference to Section 21(d)(1) of the AAA, and the doctrine of unjust enrichment was relied upon as a defense to suits to enjoin the collection of the processing tax. The defense was rejected by this Court in those cases without any showing by the processor as to whether the economic burden of the taxes in question had been shifted to others. Such a defense is no better here than it was there.[41]

We shall show under this proposition, II(C), that there is no justice in respondent's so-called defense of unjust enrichment; that processors who obtain refunds will not be *unjustly* enriched at the expense of their customers even if part of the economic burden of the tax was shifted to such customers; that the processors may not be enriched at all; that in any event neither respondent nor the Government has any semblance of right to keep the illegal exaction and defeat recovery because of any supposed equities between processors and third parties; and that in any case where the circumstances would give rise to an equity in favor of third parties with whom the processor has dealt, Title VII effec-

[41] See Respondent's brief in *Rickert Rice Mills, Inc.* v. *Fontenot*, *supra*. It was there urged that (p. 35) "To permit the processors *to recover or retain* the amount of the tax which has been passed on or back would result in the unjust enrichment of a small class of private citizens, *i. e.*, the processors, at the expense of a vastly larger class, *i. e.*, the producers and consumers." (Italics supplied.)

tively prevents the processor from recovering a refund for the benefit of such third parties.[42]

1. If Processors Recover Refunds, They Will Not be Unjustly Enriched by the Mere Fact That They Might Have Shifted Part of the Economic Burden of the Tax to Others.

The absence of any legal, equitable or moral basis for the restrictions imposed by Section 902 may be demonstrated by a simple illustration.

Let it be assumed that a processor in 1935 sold his product at a lump selling price which represented the market price. We have demonstrated that it is impossible to determine the numerical effect of the processing tax upon prices. However, let it be assumed that on the particular sale the processor was actually able to charge 2c a pound more for his product, because of the existence of the processing tax, than he would have been able to charge if the tax had never been imposed, and that the total tax with respect to the processing of such article was 4c a pound, so that the processor had shifted half of the tax burden to the purchaser. Let it

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[42] In relying upon the doctrine of *unjust* enrichment in these cases, the Government has failed to show where any *injustice* is involved. The Government's concept of unjust enrichment at least does not involve any unethical or unlawful elements, but depends entirely upon the fact that the benefit of a tax saving, where the economic burden has been shifted, is an extraordinary and unexpected benefit. In a recent brief filed by the Department of Justice, it was said:

> "While *in no sense an unethical or unlawful source of income*, the practical effect of passing the burden of an unpaid tax on to the consumer or back to the producer is necessarily to produce an *unexpected and extraordinary source of income* which may aptly be described as *unjust enrichment*." Respondent's Brief, p. 45, *Kingan & Co.* v. *Smith*, C. C. A. 7th, No. 6118. (Italics supplied.)

In the present case it cannot be said that refunds of these taxes would constitute any *unexpected* benefit to petitioner, in view of the fact that *at the time of payment (of all except $8,000.00) petitioner protested to respondent that the taxes were illegal and unconstitutional.* (R. 19.)

be further assumed that the parties to the sale and the trade generally recognized the existence of the tax, and also recognized that the AAA was of doubtful constitutionality and that the tax might be refunded or avoided.

Under such circumstances the processor would be entitled under Section 902 to a refund of only one-half of the tax, being denied recovery of the other one-half on the theory that he would be unjustly enriched at the expense of his purchaser. However, it is clear that in such a case the processor could not be unjustly enriched at the expense of his customer by a recovery of the full amount of the tax. The processor would be no more unjustly enriched at the expense of the purchaser by the receipt of a refund than the purchaser would have been unjustly enriched at the expense of the processor if the tax had been upheld.

This principle is clearly illustrated in the recent case of *Casey Jones, Inc.* v. *Texas Textile Mills, Inc.*, 87 F. (2d) 454, decided January 15, 1937, by the Circuit Court of Appeals for the Fifth Circuit, the same court which decided the case at bar. In that case the contracting parties clearly recognized the possibility that the processing tax might be avoided. They contracted that a price adjustment should be made in the event that a decision holding the processing tax invalid should be rendered by this Court within 90 days of shipment. It appeared that the shipment had occurred 117 days before the decision of this Court in *United States* v. *Butler, supra*. The purchaser claimed that it was equitably entitled to recover the amount of the processing tax on the ground that it had put the processor in funds to pay the tax which it was not required to pay, and that the retention of the funds by the processor would result in unjust enrichment. The court held that the processor was not unjustly enriched and denied recovery.

And yet if the processor in the case just discussed had been forced to pay the illegal exaction to the collector, Section 902 would apparently deny him a refund unless he could show that the price charged was not greater, because of the

existence of the processing tax, than it would have been if the processing tax had not been imposed. If the economic burden of the tax had thus been shifted by the processor, he would be denied a refund although clearly there could be no conceivable basis of charging unjust enrichment.

It is fundamental in the legal and economic system under which we live that when goods have been sold at a flat price and the parties have been content to trade at that flat price without segregating out any of the elements of cost, it is no concern of the purchaser whether the seller has made a good or a bad bargain. If the sales price has been fixed on a market which was overestimating the costs of production, the seller benefits. If the price has been fixed on a market which was underestimating costs of production, the seller loses. But no injustice has been done in either case. The parties knew at the time that one party or the other might gain by reason of a miscalculation of costs. They were free to provide, by an express contract provision, for price adjustments depending upon the final ascertainment of any *uncertain* element in the seller's costs. But if they made no such contract, it is not the business of the Government or the courts to make over the contract for them, no matter which party to the contract may profit beyond his expectations.

There is no more reason for upsetting the agreement of the parties in a case where a processing tax has been avoided than there would be in a case where the seller has secured a refund of ad valorem taxes, a return of freight overcharges or a reduction of freight rates, relief from an anticipated obligation to pay patent royalties, the benefit of new and unexpected labor saving devices, or of a reduction in any other of the elements of cost.[43] If the market has

[43] The Treasury Department recognized that the processing tax "becomes an indivisible part of the (processor's) production cost, similar to the manner in which other expenses such as depreciation, interest on capital invested, and taxes paid to the state, are incident to the conduct of a manufacturing business and enhance the cost of articles produced." See Treasury letter quoted in Appendix, p. 106.

overestimated any of these items, the seller profits. On the other hand, if any of these elements of cost have been underestimated, the seller suffers. But in either case both parties get what they contracted for.

There are some situations where a processor may be enriched unjustly at the expense of his customers if allowed to recover *and retain* refunds of processing taxes. Such a situation would exist where a processor had sold goods at a certain price "plus the processing tax attributable to the goods" in a named amount, where the tax was billed as a separate item, and where both parties to the sale mistakenly assumed that the tax was valid and would not be refunded by the Government. *Wayne County Produce Co.* v. *Duffy-Mott Co., Inc.*, 244 N. Y. 351.

In the *Wayne County Produce Co.* case, just cited, it appeared that a cider manufacturer had sold cider at a price of "14½ cents per gallon • • • plus the manufacturer's war tax of 10 per cent". The tax was collected and paid to the Federal Government, but was later refunded on the ground that the taxing act was not properly applicable to sales of cider. The court construed the transaction between the parties as one whereby the purchaser agreed "to pay a stated price, and to put the seller in funds for the payment of a tax besides". In holding that the purchaser was entitled to the refund which was made to the seller, Chief Judge Cardozo, writing the opinion of the court, said (p. 354):

> "Annulment of the tax after the sale and the delivery of an invoice, but before the payment of the price, would have extinguished the seller's right to exact payment from its customer of the added 10 per cent. Payment, if then exacted, would have been no longer payment for a tax, but payment for something else. By the same token, annulment at a later date, when followed by the refund of the tax and the undoing of the whole transaction between the seller and the Government, leaves the money applicable to the same use as if the invalidity of the impost had been declared at the beginning • • •.

> "The distinction is unimportant, at least for present purposes, between mistakes of fact and those of law. The quality of the mistake did not prevent the defendant from recovering the money from the Government. It cannot absolve from the duty of disposing of the money thus recovered as good conscience shall dictate."

However, an entirely different situation is presented where a taxpayer sells taxable products at a *flat price* without having the tax segregated and paid as such by the purchaser to the seller. This was the normal way in which processors sold their products. It is possible that in such a case the selling price may have been increased, because of the existence of the processing tax, over the price which would have been charged if there had been no processing tax. Nevertheless the purchaser does not pay the tax. All that he pays is the purchase price to obtain the goods. If the tax is never paid, or if it is paid and refunded, there is no basis for implying any promise to make a price adjustment.

In a case where a taxpayer had sold taxable goods at a flat price, this Court recognized that the seller would not be collecting the tax from the purchaser although the price had been increased because of the tax. *Lash's Products Co.* v. *United States*, 278 U. S. 175. In that case Mr. Justice Holmes, writing the opinion of the Court, said (p. 176):

> "The phrase 'passed the tax on' is inaccurate, as obviously the tax is laid and remains on the manufacturer and on him alone. Heckman & Co. v. I. S. Dawes & Son Co., 12 F. (2d) 154. The purchaser does not pay the tax. He pays or may pay the seller more for the goods because of the seller's obligation, but that is all * * *. The price is the total sum paid for the goods. The amount added because of the tax is paid to get the goods and for nothing else."

Chief Judge Cardozo, writing the opinion of the Court of Appeals in the *Wayne County Produce Co.* case, *supra*,

recognized that the case before him was distinguishable from a case where the taxpayer had sold taxable goods at a flat price. The Chief Judge said:

> "This is not a case where the item of the tax is absorbed in a total or composite price to be paid at all events. In such a case the buyer is without remedy, though the annulment of the tax may increase the profit to the seller. Moore v. Des Arts, 1 N. Y. 359." 244 N. Y. at 353.

In the absence of a controlling contract provision relating to the processing tax, a processor who has sold his products at a flat price is under no legal or equitable obligation to account to his customers for any refunds that he may obtain. *Casey Jones, Inc.* v. *Texas Textile Mills, Inc., supra; Texas Co.* v. *Harold*, 228 Ala. 350; *Moore* v. *Des Arts*, 1 N. Y. 359. And see *Wayne County Produce Co.* v. *Duffy-Mott Co., supra.* In *Casey Jones, Inc.* v. *Texas Textile Mills, Inc., supra*, the court said (p. 456):

> "In sales of this kind, if the price agreed upon is understood by the parties to exclude the tax, and the buyer agrees to put the seller in funds for payment thereof, and later the seller is relieved of the duty of paying the tax, the buyer is entitled to recover the amount paid in excess of the price. Wayne County Produce Co. v. Duffy-Mott Co., 244 N. Y. 351, 155 N. E. 669. However, if there be no agreement concerning the tax, no such right accrues to the buyer, even though the price paid includes a tax erroneously believed by the seller to be due. Lash's Products Co. v. United States, 278 U. S. 175, 49 S. Ct. 100, 73 L. Ed. 251, citing Heckman & Co. v. I. S. Dawes & Son Co., 56 App. D. C. 213, 12 F. (2d) 154. In the first case the tax is separate and apart from the contract price, while in the latter the tax is said to be buried in the price. These results have been reached in cases where the parties did not enter into any agreement concerning their rights in the event of the invalidity of the tax. Their intentions and obligations have been determined from the form of the transaction and the situation of the parties."

It is submitted that even if a processor has been able to shift the economic burden of the tax to customers, he would not for such reason be unjustly enriched upon the receipt of a refund. Where a seller of taxable articles collects the tax as tax from his customer, it might be correct to make the seller hold any refund of the tax for the account of his customer.[44] However, Section 902 clearly is not confined to such a situation. In denying refunds merely on the ground of a shift of the economic burden of the tax, Section 902 cannot be regarded as a statutory embodiment of the doctrine of unjust enrichment.

2. *Section 902 Fails to Recognize Heavy Burdens and Actual Damage to Processors Resulting from the Unlawful Imposition of Processing Taxes.*

Even where taxpayers are able to shift a tax on to purchasers of their products, economists recognize that the taxpayers themselves often suffer substantial economic burdens and direct financial damage from the imposition of the tax. Thus where a sales tax can be shifted on to purchasers in every transaction of sale, the seller may find his market greatly reduced. The increased prices which the seller charges will discourage some purchasers from buying.[45] The decrease in sales will require curtailment in production with the consequent increase in the cost of producing each unit sold. The processor might thus be seriously damaged, even though he had succeeded in shifting the tax in the case of all sales actually made.

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[44] Of course the seller will not be unjustly enriched if he must hold any refunds for the account of the buyer. *Van Antwerp v. State*, 218 N. Y. 422.

[45] *The President's Cabinet Committee on the Cotton Textile Industry* (1935) says: "Insofar as the prices of cotton textiles have been increased in consequence of the processing tax, sales have been to some extent reduced below what they would have been in the absence of the tax as an element of cost." *Sen. Doc. No. 126*, 74th Cong., 1st Sess., p. 141.

Furthermore, any increase in the price of manufactured products may cause a shift in consumption to other classes of products. This situation was recognized in the original AAA, Section 15(d) of which provided:

> "The Secretary of Agriculture shall ascertain from time to time whether the payment of the processing tax upon any basic agricultural commodity is causing or will cause to the processors or producers thereof disadvantages in competition from competing commodities by reason of excessive shifts in consumption between such commodities or products thereof. If the Secretary of Agriculture finds * * * that such disadvantages in competition exist * * *. The Secretary shall specify in this proclamation the competing commodity and the compensating rate of tax on the processing thereof necessary to prevent such disadvantages in competition. Thereafter there shall be levied, assessed, and collected upon the first domestic processing of such competing commodity a tax, to be paid by the processor, at the rate specified, * * *."

It will be noticed that the shift in consumption away from the taxable commodity had to be *excessive* before the Secretary was authorized to impose a tax on competing commodities. The Secretary did make provision for a compensating tax upon the processing of paper into paper bags and jute fabric into jute bags, products which were found to be competing with cotton bags, resulting in an excessive shift in consumption to paper and jute bags. See *T. D. 4495.*

However, no such compensating tax was ever imposed upon the processing of rayon, although it is a matter of common knowledge that rayon products do compete with certain cotton products. And if any part of the tax on the processing of cotton was shifted to purchasers of such cotton products in the form of increased prices, this circumstance necessarily had the tendency to cause a shift in consumption from cotton to rayon products, with the consequent pecuniary and economic loss to cotton manufacturers.

This is damage of a definite and real kind which pro-

cessors suffered from the unlawful imposition of the processing tax, even if they succeeded in shifting the entire tax on the goods involved in each particular sale actually made. Damage of this kind is called the "pressure" of the tax. Economists recognize that it can be very substantial in the case of some taxes and *may even involve more loss to taxpayers than the amount of tax collected by the Government.* See the introduction to Seligman, "*The Shifting and Incidence of Taxation*" (5th ed. 1926), p. 11 et seq.

Even though a processor has thus suffered substantial damage in the loss of market resulting from the imposition of the tax, Section 902 and the presumption established by Section 907 clearly deny him any recovery if he has succeeded in shifting the burden of the processing tax on the goods actually sold. In denying refunds in such cases, Title VII clearly does not involve an application of the doctrine of unjust enrichment or of any other equitable doctrine.

The colloquy between Senator Hastings, Secretary Wallace and Senator Bailey during the hearings before the Senate Finance Committee on the Revenue Bill of 1936, which is set forth in the margin,[46] shows clearly that it was recog-

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[46] "Senator Hastings. Mr. Secretary, if the processor did only half as much business as he did in former years, after the tax was put on, and the margin of profit was the same, he might very well be making very much less for his concern, might he not?

"Mr. Wallace. I think that would be an axiom, if he did only half as much business and had a small volume, he would be making less than half as much.

"Senator Hastings. Then if your rules of determining the facts are based solely upon the difference in the margin, is that a correct rule in order to determine whether or not the processor is entitled to a return of his tax?

"Mr. Wallace. I do not think the Government would be responsible for the volume of the business done.

"Senator Bailey. The Government would not be responsible for the volume, but the increased taxes and the prices reduced the volume, and I think that should be a factor that should be taken into account.

"Mr. Wallace. I think you should take it into account.

"Senator Hastings. Is your amendment drawn so that it can be taken into account?

nized that Title VII was so drafted as to give no consideration to this substantial element of damage to processors.

It is true that the kind of damage which we are here considering, that resulting from the "pressure" of the tax, is speculative and that the extent of such damage is impossible to determine. Nevertheless such damage is no more speculative than is the extent to which the tax burden has been shifted. It is certainly not *equitable* to take one of these speculative elements into consideration and not the other, as a basis for reducing the measure of recovery, effective at the time the cause of action arose.

3. *Any Unjust Enrichment of Petitioner at the Expense of Third Parties Would Not Justify Respondent's Retention of Unconstitutional Exactions.*

In urging that Title VII affords a defense based upon unjust enrichment, the Government does not contend that processors will be unjustly enriched at the expense of the Government if they recover amounts illegally exacted from them. The Government's argument is that processors will be unjustly enriched *at the expense of third parties,* that is, the vendors of their raw products or the vendees of their finished goods, if any portion of the economic burden of the tax was shifted to them.

Clearly the Government cannot defend, and cannot authorize the respondent to defend, against the refund of sums unconstitutionally exacted from processors because of any supposed equities between the processors and third persons. That is no business of the Government or the respondent. The simple fact is that the respondent has without authority exacted sums from petitioner under the supposed authority of an unconstitutional law and a right of action for the recovery of those sums immediately vested

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"Mr. Wallace. I do not think the amendments are drawn to take that particular point into account." *Hearings before Committee on Finance, U. S. Senate,* 74th Cong., 2nd Sess., on H. R. 12395, pp. 862, 863.

in the petitioner. That right of action cannot be stricken down even if the petitioner may have so conducted his business as to have passed on the economic burden of a portion of said amounts to other persons. Such matters have nothing whatever to do with the Government's duty to refund to petitioner the sums which it has been wrongfully compelled to pay.

As a matter of fact, respondent is in no better position to invoke the equitable doctrine of unjust enrichment in the defense of these actions than a collector of internal revenue would be who had failed to pay over the processing tax into the Treasury. The collector, of course, would have absolutely no legal or equitable claim upon such funds. *Neither has the Government.*

The theory of defense which respondent invokes to justify Section 902 could be just as properly made available to any wrongdoer; even to a racketeer sued by a merchant for the recovery of "protection money" illegally exacted. If such exaction was made generally from all merchants in the community handling the same products, the exactions may have resulted in an increase in price which made it possible to shift a large portion of the economic burden of the illegal exactions to purchasers. And yet no one would suggest that such a wrongdoer should be permitted to retain such illegal exactions on that ground, even if he were a Robin Hood who distributed his spoils generously and intelligently among the most deserving.

In the case of *Southern Pacific Company* v. *Darnell-Taenzer Lumber Co.*, 245 U. S. 531, this Court held that a shipper's right to recover excessive freight rates collected by a carrier could not be defeated or impaired on the ground that the shipper was able to pass on the damage to others in the way of increased prices. As this Court there said (p. 534):

> "The carrier ought not to be allowed to retain his illegal profit, and the only one who can take it from him is the one that alone was in relation with him, and from whom the carrier took the sum."

In the later case of *Louisville & Nashville R. Co.* v. *Sloss-Sheffield Steel & Iron Co.*, 269 U. S. 217, this Court again held that the shipper could recover excessive freight charged by a carrier, although the shipper had sold the transported goods f. o. b. destination and the purchaser actually paid the freight to the carrier and deducted the amount from the shipper's invoice. Mr. Justice Brandeis, writing the opinion of the court in that case, said (p. 238):

> "On goods sold f. o. b. destination, the published freight charge from the point of origin becomes, in essence, a part of the seller's cost of production. • • • The purchaser who paid the freight did so solely as agent for the seller. The carrier did not know of the provision in the sales contracts. *With the rights or equities as between seller and purchaser it had and has no concern*, nor need we concern ourselves with them." (Italics supplied).

The attempt by respondent to defeat the right of processors to recover back taxes illegally collected from them because of transactions with third parties would be not unlike the attempt to defend any other action for the recovery of money illegally exacted, because the plaintiff had been reimbursed for his loss by an insurer or by the gift of a sympathizing friend. Cf. *Chicago, St. L. & N. O. R. Co.* v. *Pullman Southern Car Co.*, 139 U. S. 79; *Olds* v. *Mapes-Reeves Const. Co.*, 177 Mass. 41; *Nashville, Chattanooga and St. L. R. Co.* v. *Miller*, 120 Ga. 453, 455.

The situation might be different if the supposed unjust enrichment had moved the Government to provide an adequate machinery to safeguard any equities of third parties, but Title VII clearly does not do this. No provision whatever is made for a refund to a vendor of a raw commodity who may have borne the burden of the tax. Even if the taxpayer has reimbursed the vendor for the tax shifted back to him, he cannot recover under Section 902.

The provision of Section 902(b), which purports on its face to protect the vendees of processors to whom the bur-

den of the tax may have been shifted, is a mockery and a sham. It cannot be expected (or even dreamed) that the processor will first make an unconditional payment to his vendee of any amount which may have been shifted to such vendee, and run the risk of establishing under Section 902(b) that such vendee did not shift the burden of the tax on to his own vendee.[47]

In other words, it is clearly apparent that Title VII has as its main purpose the retention by the Government of most of the processing taxes unconstitutionally exacted, and that it does not in any sense represent an effort on the part of the Government to insure that refunds made by it shall go to the persons who bore the economic burden of the tax. It attempts to make use of the supposed equities between the processor and his customers as an excuse for securing to the Government the fruits of its unconstitutional exactions. If in any case, a taxpayer who received a refund of such exactions would be unjustly enriched at the expense of his customer, the most that Congress could do would be to insure that any refund secured by the taxpayer should go to the person equitably entitled to the benefit of it. Congress certainly could not make such *supposed* equities of third parties the basis for striking down the seller's vested right for the recovery of taxes illegally collected from him and free the Government and its officers of all liability to any one on account of the unconstitutional exaction.

The argument which we have been making under proposition II(C) is based upon the assumption that no impossi-

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[47] The requirement that the processor pay the amount to his vendee unconditionally and then run the risk of getting a refund from the Government is to be contrasted with the procedure outlined in Section 424 of the 1928 Act, which was involved in the case of *United States* v. *Jefferson Electric Manufacturing Co.*, 291 U. S. 386. That case and the statutory provisions there involved are explained fully under proposition II(D), *infra*. Section 424 would authorize refunds to a manufacturer, where the manufacturer had repaid the amounts to their vendees, without any showing as to what such vendee did with the money or where a bond was given conditioned upon the repayment of the amount to ultimate purchasers.

bility of proof is involved in determining the extent to which the tax burden has been shifted. However, we have shown under proposition II(B) that such proof is inherently impossible. In view of the impossibility of determining the portion of the tax shifted and the portion absorbed by the processor, the processor would have a-better equity to the fund which was exacted from him than the wrongdoer, namely, the collector who collected the illegal tax or the Government which retains it without claim of right. Cf. *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U. S. 251; *Solomon* v. *Township of Oscoda*, 77 Mich. 365.

(D) The Jefferson Electric Co. Case Is Clearly Distinguishable

Respondent has relied upon the authority of *United States* v. *Jefferson Electric Mfg. Co.*, 291 U. S. 386, and the District Court rested its decision upon the authority of that case. In that case this Court upheld the validity of Section 424 of the Revenue Act of 1928,[48] which Section imposed conditions upon the refund of certain *sales taxes* which had been erroneously collected by the Government on goods not covered by the taxing Act. Section 424 provided that the vendor, who had made such erroneous payments to the Government, could recover them only by showing either that he had not collected the amount of tax from his vendees, or that if he had collected it, that he had repaid it to them, or in the alternative, that he had given bond conditioned upon such repayment to the ultimate purchasers within a reasonable time after receipt of the refund.

We submit that the *Jefferson Electric Co.* case is clearly distinguishable from the case at bar. In the first place, it seems apparent that in the *Jefferson Electric Co.* case, this Court considered that Section 424 imposed restrictions on the taxpayer's right to refund only in cases where the taxpayer had *collected the tax as a separate item* under circumstances

[48] See Appendix, *infra*, p. 100.

which would give rise to a quasi-contractual or implied contract right in favor of the purchaser against the taxpayer in the event that the taxpayer should obtain a refund. Cf. *Wayne County Produce Co.* v. *Duffy-Mott Co., Inc., supra*, pp. 55-57.

In such cases Section 424 operated on the taxpayer's legal rights in a manner similar to a real party in interest statute. The holder of the bare legal right to refund *in such cases* could not complain of the restrictions, since he would be required, apart from statute, to hold any refund for his customers' account. Section 424 simply provided procedural machinery to insure the payment of the refunds to the parties beneficially and equitably entitled thereto. It will be shown that this was the view which the Government urged and which was adopted by this Court.

The only argument in support of the constitutionality of Section 424 which was made in any of the briefs filed by the Government in the *Jefferson Electric Co.* group of cases, was expressly based upon the proposition that in cases covered by Section 424 purchasers would have a quasi-contractual right against the taxpayer to share in any refunds of the tax. The Solicitor General there urged:

> "If a manufacturer had not borne the burden of the tax but had collected it directly from the consumer, then the manufacturer, if he obtained a refund, would be *liable to the consumer in an action based on quasi-contract*. (Italics supplied.) • • • The effect of the statute, therefore, was to deprive the taxpayer of its *legal* right to a refund if the taxpayer was not in fact and in law *beneficially* entitled to it." (Brief, *American Chain Co.* v. *Eaton*, pp. 13, 14.)

The Government did not suggest in its argument that the prohibition of Section 424 was applicable to a case where a taxpayer would not be liable over to others in the event that he should obtain a refund. That this Court did not intend to go beyond the Government's argument is indi-

cated from the following passage taken from its opinion in the *Jefferson Electric Co.* case (p. 402):

> "But it cannot be conceded that in imposing this restriction the section strikes down prior rights, or does more than to require that it be shown or made certain that the money when refunded will go to the one who has borne the burden of the illegal tax, and therefore is entitled in justice and good conscience to such relief. This plainly is but another way of providing that the money shall go to the one who has been the actual sufferer and therefore is the real party in interest.
>
> "We do not perceive in the restriction any infringement of due process of law. • • • Statutes made applicable to existing claims or causes of action and requiring that suits be brought by the real rather than the nominal party in interest have been uniformly sustained when challenged as infringing the contract and due process clauses of the Constitution."

It is submitted that this Court based its decision in the *Jefferson Electric Co.* case upon the ground that Section 424 simply made effectual the pre-existing rights of the taxpayer's vendees, and deprived the taxpayer of nothing which he would have been entitled to *retain* against the claims of his vendees.

This view of the Court's decision in the *Jefferson Electric Co.* case is confirmed by the factual background. The tax involved in the *Jefferson Electric Co.* case was a sales tax measured by a fixed percentage of selling price. In order to effect a saving in the amount of tax payable to the Government, manufacturers had followed the general practice of undertaking to collect the tax as such from their vendees, as an item separate from the stated purchase price. Where this procedure was followed, the Treasury recognized the parties' treatment of the amount paid by the vendee as part purchase price and part tax, and allowed the tax to be computed on the basis of the stated purchase price. Thus the total tax paid was less than it would have

been if measured by a percentage of the entire amount paid by the vendee. See Regulations 47, Article 3, quoted in the Appendix, *infra*, p. 103. In the light of this general practice, sanctioned by the Treasury Regulations, Section 424 was enacted and undertook in terms to condition refunds only in cases where the taxpayer had collected the tax from his vendee.

Under the circumstances it is clear that, in sustaining section 424, this Court considered that section as applying only where a taxpayer had collected the tax as such from his vendees and where the taxpayer would be required to hold any refunds for their account. The Government would be the first to deny that Section 902 should receive such a limited construction; *since processors did not generally collect the processing tax as such from their vendees, but on the contrary sold their goods at a flat price.* In such cases, as we have shown in proposition II(C)(1), the processors' vendees would have no equitable claims to the refunds even though the economic burden of the tax was shifted to them. Section 902 therefore cannot operate as a real party in interest statute.

In several places in the opinion of the Court Mr. Justice Van Devanter uses the expressions "shifted the burden" and "borne the burden". However, it is clear from a reading of the opinion as a whole that the Court did *not* interpret Section 424 as imposing a restriction on refunds on the basis of the taxpayer's having shifted the *economic* burden of the tax, which seems clearly to be the general purpose of Section 902. In referring to cases where the taxpayer had "shifted the burden" and "borne the burden", Mr. Justice Van Devanter clearly was referring to cases where the taxpayer had or had not *collected the tax as such from vendees.* This is made clear from the following statement made in the course of the opinion (p. 402):

> "If the taxpayer has borne the burden of the tax, he readily can show it".

It is inconceivable that the Court would suggest that there was *no difficulty* in determining whether a taxpayer had *shifted the economic burden of the tax.*[49] Even the Government will not claim that such a question can be "readily" answered. We have shown, under proposition II(B) (2), *supra,* that it is not only difficult, but actually impossible, to ascertain whether or to what extent the economic burden of the tax has been shifted.

In none of the briefs for taxpayers or the Government in any of the cases on the *Jefferson Electric Co.* group was any suggestion made that there would be any impossibility, or any difficulty, of proof in establishing the conditions laid down by Section 424.[50] This shows clearly that the parties did not consider that those cases involved any question as to *who bore the economic burden of the tax.*

(E) Section 906 Does Not Afford a Fair Administrative Remedy on Claims for Refund of Processing Taxes.

We may concede, for purposes of argument, under this proposition, that Congress could strike down petitioner's vested right of action against the collector if an equivalent substitute be provided.[51] It may be granted further for

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[49] This Court has apparently drawn a distinction between sales taxes and manufacturing taxes, with respect to the directness or indirectness of the shifting of tax burdens. See *Indian Motocycle Co.* v. *United States,* 283 U. S. 570. Cf. *Wheeler Lumber B. & S. Co.* v. *United States,* 281 U. S. 572; *Liggett & Myers Tobacco Co.* v. *United States,* 81 L. ed. adv. ops. 215. Mr. Justice Van Devanter wrote the opinion of the court in the two cases first cited, as well as in the *Jefferson Electric Co.* case. The distinction which he has drawn would indicate that whatever his views might be as to the facility of showing a shift in the burden of a *sales tax,* he would recognize that the possibility of shifting a *manufacturing or processing tax* would present a different question.

[50] In the taxpayer's brief in No. 171, page 16, it was said: "The question whether the tax has been 'passed on' to the customer is one of fact readily susceptible of proof and judicial determination."

[51] We have argued under proposition II(A), *supra,* that the collector's personal liability cannot be destroyed regardless of whether any alternative remedy is provided.

purposes of argument that the substituted remedy need not be judicial,[52] but that a fair *administrative remedy* may constitute due process of law. We may also assume for the present argument that an administrative tribunal is able to determine the extent to which the tax burden has been shifted,[53] and that such shifting results in unjust enrichment, which constitutes an equitable defense to refund proceedings.[54] We urge here that, even if all this be conceded, the administrative remedy provided in Title VII is not a fair administrative remedy and does not constitute due process, and that in any event it is in no sense equivalent to the remedy which it seeks to displace. Petitioner's right of action certainly cannot be destroyed under the Fifth Amendment by substituting an *unfair and inadequate* administrative remedy.

Section 906 of the 1936 Revenue Act undertakes to lay down the exclusive method of procedure on claims for refund of processing taxes. It is there provided that the Commissioner shall allow or disallow claims within three years after they are filed. Section 906(b) provides for the creation of a so-called "Board of Review" in the Treasury Department. This "Board of Review" is given jurisdiction "to review the allowance or disallowance of the Com-

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[52] Due process of law requires that a judicial remedy be afforded at some stage in a case of disputed tax liability. *Phillips* v. *Commissioner*, 283 U. S. 589, 595, 597. This should be especially true where, as here, the dispute entrusted to the administrative tribunal is not as to the illegality of the exaction but as to the effect, upon the taxpayer's right to recover for an admittedly illegal exaction, of dealings between the taxpayer and third parties in which the Government is no way involved, and especially where the administrative remedy *is substituted for a vested right of action which had already arisen against a collector for an unconstitutional exaction.*

[53] We have demonstrated under proposition II(B) (2), *supra*, the inherent impossibility of ascertaining such fact.

[54] We have shown under proposition II(C), *supra*, that no defense can be based upon the shifting of the tax burden, even if proof of the extent of the shift were possible.

missioner of a claim for refund, and to determine the amount of refund due any claimant".

Section 906(c) provides that where a claim has been disallowed, the claimant may file a petition with the Board of Review, requesting a hearing on the merits of the claim. Section 906(d) provides that each such hearing shall be conducted, *not* by the Board of Review, nor even a division thereof, but by a "presiding officer" *who shall be an officer or employee of the Treasury Department*, designated a "presiding officer" by the Secretary of the Treasury.

Section 906(e) provides that the so-called "presiding officer", who conducts the hearing, shall *recommend* findings of fact and a decision to the Board, and that the Board, or a division thereof, shall make its findings of fact and decision in writing. The Board, or a division, which makes the actual findings and decision, is not required by the statute to consider the evidence. It is not even provided that a record of the evidence upon which the findings are recommended be submitted to the tribunal which makes the decision.

It is submitted that the procedure contemplated by Section 906 does not satisfy the requirements of a full and fair administrative hearing, as laid down by this Court in *Morgan v. United States*, 298 U. S. 468. Section 906 does not provide any "safeguard that the one who decides shall be bound in good conscience to consider the evidence, to be guided by that alone, and to reach his conclusion uninfluenced by extraneous considerations which in other fields might have play in determining purely executive action." In order to have fair administrative procedure, "*The one who decides must hear*". 298 U. S. at 480, 481.[58]

Moreover, the Board of Review is not an *independent* administrative agency like the Board of Tax Appeals, but is

[58] "It seems absurd that one official should hold a public enquiry into the merits of a proposal, and that another official should be entitled, disregarding the report of the first, to give a decision on the merits." Hewart, "*The New Despotism*", p. 51.

on the contrary *required* by statute to be composed wholly of employees and subordinate officials of the Department, which is the claimant's adversary in the proceeding.[56] The Treasury Department should not be allowed to be judge in its own case. Cf. *Tumey* v. *Ohio*, 273 U. S. 510, and see *Report of Special Committee on Administrative Law, American Bar Association* (1936), Advance Program, pp. 214-225. A proceeding before such a tribunal is certainly no equivalent of petitioner's remedy against the collector which it seeks to displace.

It is therefore submitted that the so-called remedy afforded by Section 906 is not a valid administrative remedy in any sense of the term, and does not comply with the requirements of due process of law. Even if as to future transactions Congress could constitutionally limit taxpayers to such an administrative remedy for the recovery of taxes illegally collected, nevertheless it should be clear that *Congress cannot strike down a vested right of action at law against a collecter and substitute this kind of remedy in its place.*

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[56] As Lord Chief Justice Hewart has said: "One would have thought it perfectly obvious that no one employed in an administrative capacity ought to be entrusted with judicial duties in matters connected with his administrative duties. The respective duties are incompatible. It is too much to expect in such circumstances that he should perform the judicial duties impartially. Even if he acts in good faith, and does his best to come to a right decision, he cannot help bringing what may be called an official or departmental mind, which is a very different thing from a judicial mind, as everybody who has had dealings with public officials knows, to bear on the matter he has to decide. More than that, it is his duty, as an official, to obey any instructions given him by his superiors, and in the absence of special instructions, to further what he knows to be the policy of his Department. His position makes it inevitable that he should be subject to political influences." Hewart, *"The New Despotism"*, p. 46.

III.

Sections 903, 904 and 906 Are Inseparably Connected With the Unconstitutional Provisions of Section 902.

Section 902 is the axis of Title VII. If that Section is unconstitutional, then Title VII falls as a whole.[57]

Section 903 requires the filing of new claims for refund after the enactment of the 1936 Revenue Act. Section 904 provides that suits for the recovery of AAA taxes other than processing taxes shall not be brought before the expiration of eighteen months from the filing of a claim under Title VII. It is clear from a consideration of the provisions of Title VII as a whole, and also from the legislative history, that both of these Sections were enacted solely upon the assumption that Section 902 was constitutional, and that the Commissioner would be required to pass upon the question as to whether the tax burden had been shifted by individual claimants.[58]

The same is true of Section 906, which prohibits court action for the recovery of amounts collected as processing taxes and provides for a proceeding before the Board of Review, as explained under proposition II(E), *supra*. The Congressional Committees[59] explained that the necessity

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[57] See *Lynch* v. *United States*, 292 U. S. 571, 586; *Williams* v. *Standard Oil Co.*, 278 U. S. 235, 241, 242; *Poindexter* v. *Greenhow*, 114 U. S. 270, 304, 305; *Dorchy* v. *Kansas*, 264 U. S. 286, 289, 290; *Railroad Retirement Board* v. *Alton R. Co.*, 295 U. S. 330, 361, 362; *Carter* v. *Carter Coal Co.*, 298 U. S. 238, 312, 313.

[58] The Congressional Committee said: "It is, therefore, necessary that new claims be filed so that each claimant's right to secure a refund may be established in accordance with the procedure set forth under title VII. Section 903 gives the Commissioner the authority to prescribe the number of claims which may be filed by any person. • • • In order, therefore, to obtain a proper determination of the incidence of taxes paid with respect to such commodities, it is necessary that the Commissioner be permitted to require that a single claim be filed with respect to the taxes paid with respect to such commodities." *Senate Rept. No. 2156*, 74th Cong., 2nd Sess., pp. 34, 35. *House Rep. No. 2818*, 74th Cong., 2nd Sess., p. 4.

[59] See *Senate Rep. No. 2156*, 74th Cong., 2nd Sess., p. 33. *House Rep. No. 2818*, 74th Cong., 2nd Sess., p. 2.

for such special statutory proceedings is due to the "extremely complicated economic and accounting considerations" involved in the question as to whether processing taxes were passed on. Section 906 is simply an adjunct to Section 902, which provides that no refund of any amount paid as tax under the AAA shall be allowed, "unless the claimant establishes to the satisfaction of • • • the Board of Review in cases provided for under Section 906 • • • that he bore the burden of such amount."

The necessary dependence of these procedural provisions of Title VII upon the essential provisions of Section 902 eliminates any question of an attempt by Congress to curtail the jurisdiction of the Courts in these cases. There is certainly no basis for suggesting that Congress has attempted in Title VII to exercise its peculiar control over the jurisdiction of inferior Federal courts. No distinction is made in Title VII between State and Federal courts, and it would be ridiculous to suppose that Congress intended to amend the jurisdictional statute[60] so as to exclude these cases from the District Courts if they may still be maintained in the State Courts.

IV.

The Absurd and Dangerous Consequences of Respondent's Defense Demonstrate Its Fallacy.

The fallacy of the argument on which the Government relies in justification of Title VII, and the absurd and dangerous consequences to which it leads are readily apparent if we consider briefly "the scope of the principle for which the Government contends" and "test the principle by its applications" and observe "that, by the exercise of the asserted power, Congress would, in effect, under the pretext of" regulating matters of procedure and burden of proof, "in reality accomplish prohibited ends"[61] namely, the de-

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[60] Section 24 of the Judicial Code as Amended, 28 U. S. C. A. Sec. 41.

[61] *United States* v. *Butler*, 297 U. S. 1, 77.

nial of all remedy for the illegal collection of taxes and the destruction of vested rights of action against the United States and its officers for sums unconstitutionally exacted.

If the principle of Title VII is upheld, can there be any doubt that Congress will time and time again invoke the same means of enabling the Government to collect and retain illegal exactions of all kinds? In the future, as other novel legislation is passed imposing heavy exactions upon citizens, large sums will be collected for the Government while injunctions are resisted on the ground that there is a plain, adequate and complete remedy recognized by the Revised Statutes for the recovery back of internal revenue taxes illegally collected. When the refund actions get to a dangerous point, Congress will again undertake to limit the right of recovery to those cases where the plaintiffs can establish the existence of certain conditions by proof which is highly speculative, difficult and expensive, if not impossible. The Government would thus be able to retain at least a very large percentage of any illegal exactions.

By following such steps as those outlined, Congress would in effect be able to destroy all remedy for the wrongful collection of large amounts of taxes.[82]

If this procedure can be followed in dealing with processing taxes it is difficult to suggest any reason why it cannot be applied in any other case where Congress wishes to apply it. If it should appear that great sums of income taxes have been collected under some unconstitutional provision of a Revenue Act, Congress might impose the same kind of condition on the recovery back of such taxes. Economists explain that there is probably a difference in the extent to which income taxes, as distinguished from excise taxes, can be shifted to others, but they recognize that some income taxpayers are able to shift at least part of the tax

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[82] Due process of law requires that some effective remedy be afforded for the illegal collection of taxes. *Brinkerhoff-Faris T. & S. Co.* v. *Hill*, 281 U. S. 673; *Carpenter* v. *Shaw*, 280 U. S. 363; *Ward* v. *Love County*, 253 U. S. 17. See discussion *supra*, p. 11.

burden to others,"[83] and it would, of course, be impossible to show the extent of the shift.

Congress might attempt at some future time to impose a direct tax on real estate (in some sort of disguise of course) without making any attempt to comply with the constitutional requirement of apportionment. *After* the tax is collected, the refund statutes could be amended so as to deny refunds unless the taxpayer carries the impossible burden of showing that he absorbed the tax. Merchants and manufacturers owning and occupying property subject to the tax would be deprived of a refund because of their inability to show the extent to which the tax may have affected their purchase and selling prices and the wages paid to their employees.

The examples suggested "are no more improbable than would the present act have been deemed a few years ago".[84]

CONCLUSION.

It is submitted that Title VII of the Revenue Act of 1936 is unconstitutional and void, that petitioner's complaint sets forth a cause of action, and that the judgments of the lower courts were erroneous and should be reversed.

Respectfully submitted,

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[83] See Fagan & Macy, *"Public Finance—Selected Readings"* (1934), pp. 255 *et seq.*; Lutz, *"Public Finance"* (2d ed. 1929), p. 338; Hunter, *"Outlines of Public Finance"* (1926), p. 162; Brown, *"The Economics of Taxation"* (1924), pp. 202 *et seq.*

[84] *United States* v. *Butler*, 297 U. S. 1, 77.

APPENDIX

APPENDIX

Revenue Act of 1936, Title VII—Refunds of Amounts Collected under the Agricultural Adjustment Act.

SEC. 901. *Repeals:*

Sections 21(d), 21(e) and 21(g) of the Agricultural Adjustment Act, as amended, are hereby repealed.

SEC. 902. *Conditions on Allowance of Refunds:*

No refund shall be made or allowed, in pursuance of court decisions or otherwise, of any amount paid by or collected from any claimant as tax under the Agricultural Adjustments Act, unless the claimant establishes to the satisfaction of the Commissioner in accordance with regulations prescribed by him, with the approval of the Secretary, or to the satisfaction of the trial court, or the Board of Review in cases provided for under Section 906, as the case may be—

(a) That he bore the burden of such amount and has not been relieved thereof nor reimbursed therefor nor shifted such burden, directly or indirectly, (1) through inclusion of such amount by the claimant, or by any person directly or indirectly under his control, or having control over him, or subject to the same common control, in the price of any article with respect to which a tax was imposed under the provisions of such Act, or in the price of any article processed from any commodity with respect to which a tax was imposed under such Act, or in any charge or fee for services or processing; (2) through reduction of the price paid for any such commodity; or (3) in any manner whatsoever; and that no understanding or agreement, written or oral, exists whereby he may be relieved of the burden of such amount, be reimbursed therefor, or may shift the burden thereof; or

(b) That he has repaid unconditionally such amount to his vendee (1) who bore the burden thereof, (2) who has not been relieved thereof nor reimbursed therefor, nor shifted such burden, directly or indirectly, and (3) who is not entitled to receive any reimbursement therefor from any other source, or to be relieved of such buden in any manner whatsoever.

SEC. 903. *Filing of Claims:*

No refund shall be made or allowed of any amount paid by or collected from any person as tax under the Agricultural Adjustment Act unless, after the enactment of this Act, and prior to July 1, 1937, a claim for refund has been filed by such person in accordance with regulations prescribed by the Commissioner with the approval of the Secretary. All evidence relied upon in support of such claim shall be clearly set forth under oath. The Commissioner is authorized to prescribe by regulations, with the approval of the Secretary, the number of claims which may be filed by any person with respect to the total amount paid by or collected from such person as tax under the Agricultural Adjustment Act, and such regulations may require that claims for refund of processing taxes with respect to any commodity or group of commodities shall cover the entire period during which such person paid such processing taxes.

SEC. 904. *Statute of Limitations:*

Notwithstanding any other provision of law, no suit or proceeding, whether brought before or after the date of enactment of this Act, shall be brought or maintained in any court for the recovery, recoupment, setoff, refund, or credit of, or counterclaim for, any amount paid by or collected from any person as tax (except processing tax, as defined herein) under the Agricultural Adjustment Act (a) before the expiration of eighteen months from the date of filing a claim therefor under this Title, unless the Commissioner renders a decision thereon within that time, or (b) after the expiration of two years from the date of mailing by registered mail by the Commissioner to the claimant a notice of disallowance of that part of the claim to which such suit or proceeding relates. Any consideration or any action by the Commissioner with respect to such claim following the mailing of notice of disallowance shall not operate to extend the period within which any suit or proceeding may be brought.

SEC. 905. *Jurisdiction of Courts:*

Concurrent with the Court of Claims, the District Courts of the United States (except as provided in section 906 of this title) shall have jurisdiction of cases to which this title applies, regardless of the amount in controversy, if such district courts would have had jurisdiction of such cases but for limitations under the Judicial Code, as amended, on jurisdiction of such courts based upon the amount in controversy. The United States Customs Court shall not have jurisdiction of any such cases.

SEC. 906. *Procedure on Claims for Refunds of Processing Taxes:*

(a) Notwithstanding any other provision of law, no suit or proceeding, whether brought before or after the date of the enactment of this Act, shall be brought or maintained in any court for the refund of any amount paid or collected as processing tax, as defined herein, under the Agricultural Adjustment Act, except as provided in this section. The Commissioner shall allow or disallow, in whole or in part, any claim for refund of any such amount within three years after such claim was filed, unless such time has been extended by written consent of the claimant.

(b) There is hereby established in the Treasury Department a Board of Review (hereinafter referred to as "the Board"). The Board shall be composed of nine members who shall be officers or employes of the Treasury Department designated by the Secretary of the Treasury. One of such members shall be designated by the Secretary to act as chairman of the Board. The chairman may from time to time divide the Board into divisions of one or more members, assign the members of the Board thereto, and in case of a division of more than one member designate the chief thereof. A majority of the members of the Board or of any division thereof shall constitute a quorum for the transaction of the business of the Board or of the division respectively. A vacancy in the Board or in any division

thereof shall not impair the powers nor affect the duties of the Board or division nor of the remaining members of the Board or division respectively. The Secretary of the Treasury shall assign to the Board such personnel in the Treasury Department as may be necessary to perform its functions. The Board shall have jurisdiction in proceedings under this section to review the allowance or disallowance of the Commissioner of a claim for refund, and to determine the amount of refund due any claimant with respect to such claim. The Commissioner shall make refund of any such amount determined by a decision of the Board which has become final. The proceedings of the Board and its divisions shall be conducted in accordance with such rules and regulations as the Board may prescribe, with the approval of the Secretary.

(c) The allowance or disallowance of the Commissioner of a claim for refund under this section shall be final, unless within three months after the date of mailing by registered mail by the Commissioner of notice that a claim for refund of any such amount has been disallowed, in whole or in part, the claimant files a petition with the Board requesting a hearing on the merits of his claim, in whole or in part. Upon the filing of any such petition, the claimant shall be entitled to a hearing as provided herein, and within three months after the date of such filing the Board shall set a date for such hearing which shall be not more than two years from the date of filing of the petition. Such hearing shall be held in Washington, District of Columbia, or in the collection district in which is located the principal place of business of the claimant, as the claimant may designate in his petition, or in any place which may be designated by the Commissioner and the claimant by stipulation in writing, and may be continued from day to day. The Board shall notify the claimant and the Commissioner of the time and place set for such hearing by registered mail.

(d) Each such hearing shall be conducted by a presiding officer who shall be a member of the Board or an officer or

employee of the Treasury Department designated a presiding officer by the Secretary of the Treasury, and assigned by the Board to preside at such hearing, and shall be open to the public. The proceedings in such hearings shall be conducted in accordance with such rules of practice and procedure (other than rules of evidence) as the Board may prescribe with the approval of the Secretary of the Treasury, and in accordance with the rules of evidence applicable in courts of equity of the District of Columbia. The claimant and the Commissioner shall be entitled to be represented by counsel, to have witnesses subpœnaed, and to examine and cross-examine witnesses. The presiding officer shall have authority to administer oaths, examine witnesses, rule on questions of procedure and the admissibility of evidence, and to require by subpœna, signed by any member of the Board, the attendance and testimony of witnesses and the production of all necessary returns, books, papers, records, correspondence, memoranda, and other evidence, from any place in the United States at any designated place of hearing, and to require the taking of a deposition by any designated individual competent to administer oaths. Any witness summoned or whose deposition is taken pursuant to this section shall receive the same fees and mileage as witnesses in the courts of the United States.

(e) The presiding officers shall recommend findings of fact and a decision to the Board or the proper division thereof within six months after the conclusion of the hearing. Briefs with respect to such recommendations may be submitted to the Board or such division on behalf of the Commissioner and the claimant within thirty days after such recommendations have been made, unless such time is extended by the Board or such division. Except upon specific order of the chairman of the Board, no oral argument may be presented to the Board or such division after the conclusion of the hearing. The Board or a division shall make its findings of fact and decision in writing as quickly as practicable. The findings of fact and the decision of a

division shall become the findings of fact and decision of the Board within thirty days after they have been made by the division, unless within such period, the chairman has directed that such findings and decision shall be reviewed by the Board. The findings and decision of a division shall not be a part of the record in any case in which the chairman directs that such findings and decision shall be reviewed by the Board. Copies of the findings of fact and decision of the Board shall be mailed to the claimant and the Commissioner by registered mail.

(f) The Board, with the approval of the Secretary of the Treasury, is authorized to draw up a table of costs and fees relating to such hearings, and the preparation of transcripts of record thereof, not to exceed with respect to any one item those charged in the Supreme Court of the United States. Such costs and fees shall be paid by the claimant and be collected in accordance with such rules and regulations as may be prescribed by the Board, with the approval of the Secretary. If the hearing provided herein results in a modification of the allowance or disallowance of the Commissioner, such costs shall be returned to the claimant.

(g) A review of the decision of the Board, made after the hearing provided in this section, may be obtained by the claimant or Commissioner by filing a petition for review in the Circuit Court of Appeals of the Unted States within any circuit wherein such claimant resides, or has his principal place of business, or, if none, in the United States Court of Appeals for the District of Columbia, or any such court which may be designated by the Commissioner and the claimant by stipulation in writing, within three months after the date of the mailing to the claimant and the Commissioner of the copy of the findings and decision of the Board. A copy of such petition shall forthwith be served upon the Commissioner or upon any officer designated by him for that purpose, or upon the claimant, according to which party files such petition, and upon the Board. Thereupon the Board shall certify and file in the court, in which

such petition has been filed, a transcript of the record upon which the findings and decision complained of were based. Upon the filing of such transcript such court shall have exclusive jurisdiction to affirm the decision of the Board, or to modify or reverse such decision, if it is not in accordance with law, with or without remanding the cause for a rehearing, as justice may require. No objection shall be considered by the court unless such objection shall have been urged before the Board or division and the presiding officer, or unless there were reasonable grounds for failure so to do. If the claimant or the Commissioner shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material, and that there were reasonable grounds for failure to adduce such evidence in the hearing before the presiding officer, the court may order such additional evidence to be taken before such officer, and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Board may modify its findings of fact and decision by reason of the additional evidence so taken and it shall file with the court such modified or new findings and decision. The judgment of the court shall be final, subject to review by the Supreme Court of the United States, upon certification or certiorari as provided in sections 239 and 240 of the Judicial Code, as amended. Such courts are authorized to adopt rules for the filing of petitions for review, the preparation of the record for review, and the conduct of the proceedings on review. If the decision of the Board is affirmed, costs shall be awarded against the claimant, and if such decision is reversed, the judgment shall provide for a refund of any costs paid by the claimant. In case of modification of such decision costs shall be awarded or refused as justice may require. The decision of the Board made after the hearing provided herein shall become final in the same manner that decisions of the Board of Tax Appeals become final under section 1005 of the Revenue Act of 1926, as amended.

SEC. 907. *Evidence and Presumption:*

(a) Where the refund claimed is for an amount paid or collected as processing tax, as defined herein, it shall be prima-facie evidence that the burden of such amount was borne by the claimant to the extent (not to exceed the amount of the tax) that the average margin per unit of the commodity processed was lower during the tax period than the average margin was during the period before and after the tax. If the average margin during the tax period was not lower, it shall be prima-facie evidence that none of the burden of such amount was borne by the claimant but that it was shifted to others.

(b) The average margin for the tax period and the average margin for the period before and after the tax shall each be determined as follows:

(1) *Tax Period.*—The average margin for the tax period shall be the average of the margins for all months (or portions of months) within the tax period. The margin for each such months shall be computed as follows: From the gross sales value of all articles processed by the claimant from the commodity during such month, deduct the cost of the commodity processed during the month and deduct the processing tax paid with respect thereto. The sum so ascertained shall be divided by the total number of units of the commodity processed during such months, and the resulting figure shall be the margin for the month.

(2) *Period Before and After the Tax.*—The average margin for the period before and after the tax shall be the average of the margins for all months (or portions of months) within the period before and after the tax. The margin for each such month shall be computed as follows: From the gross sales value of all articles processed by the claimant from the commodity during such month, deduct the cost of the commodity processed during the month. The sum so ascertained shall be divided by the number of

units of the commodity processed during such month, and the resulting figure shall be the margin for the month.

(3) *Average Margin.*—The average margin for each period shall be ascertained in the same manner as monthly margins under subdivisions (1) and (2), using total gross sales value, total cost of commodity processed, total processing tax paid, and total units of commodity processed, during such period.

(4) *Combination of Commodities.*—Where, as, for example, in the case of certain types of tobacco, the articles produced and sold by the claimant are the product of several commodities combined by him during processing, the average margins shall be established with respect to such commodities as a group, and not individually, in accordance with rules and regulations prescribed by the Commissioner, with the approval of the Secretary of the Treasury.

(5) *Cost of Commodity.*—The cost of commodity processed during each month shall be (a) the actual cost of the commodity processed if the accounting procedure of the claimant is based thereon, or (b) the product computed by multiplying the quantity of the commodity processed by the current prices at the time of processing for commodities of like quality and grade in the markets where the claimant customarily makes his purchases.

(6) *Gross Sales Value of Articles.*—The gross sales value of articles shall mean (a) the total of the quantity of each article derived from the commodity processed by the claimant during each month multiplied by (b) the claimant's sale prices current at the time of processing for articles of similar grade and quality.

(7) The quantity of each article derived from the commodity processed may be either (a) the actual quantity obtained, as shown by the records of the claimant, or (b) an estimated quantity computed by multiplying the quantity

of commodity processed by appropriate conversion factors giving the quantity of articles customarily obtained from the processing of each unit of the commodity.

(c) The "tax period" shall mean the period with respect to which the claimant actually paid the processing tax to a collector of internal revenue and shall end on the date with respect to which the last payment was made. The "period before and after the tax" shall mean the twenty-four months (except that in the case of tobacco it shall be the twelve months) immediately preceding the effective date of the processing tax, and the six months, February to July, 1936, inclusive. If during any part of such period the claimant was not in business, or if his records for any part of such period are so inadequate as not to provide satisfactory data on prices paid for commodities purchased or prices received for articles sold, the average prices paid or received by representative concerns engaged in a similar business and similarly circumstanced may with the approval of the Commissioner, where necessary for a fair comparison, be substituted in making the necessary computations. If the claimant was not in business during the entire period before and after the tax, the average margin, during such period, of representative concerns engaged in a similar business and similarly circumstanced may with the approval of the Commissioner, where necessary for a fair comparison, be substituted in making the necessary computations. If the claimant was not in business during the entire period before and after the tax, the average margin, during such period, of representative concerns engaged in a similar business and similarly circumstanced, as determined by the Commissioner, shall be used as his average margin for such period.

(d) If the claimant made any purchase or sale otherwise than through an arm's-length transaction, and at a price other than the fair market price, the Commissioner may determine the purchase or sale price to be that for

which such purchases or sales were at that time made in the ordinary course of trade.

(e) Either the claimant or the Commissioner may rebut the presumption established by subsection (a) of this section by proof of the actual extent to which the claimant shifted to others the burden of the processing tax. Such proof may include, but shall not be limited to—

(1) Proof that the difference or lack of difference between the average margin for the tax period and the average margin for the period before and after the tax was due to changes in factors other than the tax. Such factors shall include any clearly shown change (A) in the type or grade of article or commodity, or (B) in costs of production. If the claimant asserts that the burden of the tax was borne by him and the burden of any other increased costs was shifted to others, the Commissioner shall determine, from the effective dates of the imposition or termination of the tax and the effective date of other changes in costs as compared with the date of the changes in margin (when margins are computed for weeks, months, or other intervals between July 1, 1931, and August, 1936, in the manner specified in subsection (b)), and from the general experience of the industry, whether the tax or the increase in other costs was shifted to others. If the Commissioner determines that the difference in average margin was due in part to the tax and in part to the increase in other costs, he shall apportion the change in margin between them;

(2) Proof that the claimant modified existing contracts of sale, or adopted a new form of contract of sale, to reflect the initiation, termination, or change in amount of the processing tax, or at any such time changed the sale price of the article (including the effect of a change in size, package, discount terms, or any other merchandising practice) by substantially the amount of the tax or change therein, or at any time billed the tax as a separate item to any ven-

dee, or indicated by any writing that the sale price included the amount of the tax, or contracted to refund any part of the sale price in the event of recovery of the tax or decision of its invalidity; but the claimant may establish that such acts were caused by factors other than the processing tax, or that they do not represent his practice at other times. If the claimant processed any product in addition to the commodity with respect to the processing of which there was paid or collected an amount as tax for which he claims a refund, and if the Commissioner has reason to believe that the burden of such amount was shifted in whole or in part by means of the transactions relating to such product, the average margin with respect to such product, and articles processed therefrom, shall also be considered, and shall be determined for the tax period applicable to the commodity and for the period before and after the tax in the manner prescribed in subsection (b) of this section. To the extent the Commissioner determines that the average margin with respect to such product was higher during the tax period than it was during the period before and after the tax, it shall be prima-facie evidence that such amount was not borne by the claimant but that it was shifted to others.

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SEC. 910. *Liability of Collectors:*

No collector of internal revenue or customs, or internal revenue or customs officer or employee, shall be in any way liable to any person for any act done by him in the assessment or collection of any amount as tax under the Agricultural Adjustment Act, or for the recovery of any money exacted by or paid to him and paid into the Treasury, in performance of his official duties under the provisions of such Act, or if such collector or officer acted under the direction of the Secretary or other proper officer of the Government.

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SEC. 913. *Definitions:*

When used in this title—

(a) The term "tax" means a tax or exaction denominated a "tax" under the Agricultural Adjustment Act, and shall include any penalty, addition to tax, additional tax, or interest applicable to such tax:

(b) The term "processing tax" means any tax or exaction denominated a "processing tax" under the Agricultural Adjustment Act, but shall not include any amount paid or collected as tax with respect to the processing of a commodity for a customer for a charge or fee.

(c) The term "commodity" means any commodity, prior to processing, of a type with respect to the processing of which a processing tax was imposed under the Agricultural Adjustment Act.

(d) The term "article" means the product which is obtained by processing a commodity, and includes the product obtained by further manufacture or by combination with other materials.

(e) The term "refund" includes any recovery, recoupment, set-off, credit, or counterclaim.

(f) The term "Agricultural Adjustment Act" means the Agricultural Adjustment Act as originally enacted and the amendments thereto adopted prior to January 6, 1936.

Revenue Act of 1936, Title III—Tax on Unjust Enrichment.

SEC. 501. *Tax on Net Income from Certain Sources:*

(a) The following taxes shall be levied, collected, and paid for each taxable year (in addition to any other tax on net income), upon the net income of every person which arises from the sources specified below:

(1) A tax equal to 80 per centum of that portion of the net income from the sale of articles with respect to

which a Federal excise tax was imposed on such person but not paid which is attributable to shifting to others to any extent the burden of such Federal excise tax and which does not exceed such person's net income for the entire taxable year from the sale of articles with respect to which such Federal excise tax was imposed.

(2) A tax equal to 80 per centum of the net income from reimbursement received by such person from his vendors of amounts representing Federal excise-tax burdens included in prices paid by such person to such vendors, to the extent that such net income does not exceed the amount of such Federal excise-tax burden which such person in turn shifted to his vendees.

(3) A tax equal to 80 per centum of the net income from refunds or credits to such person from the United States of Federal excise taxes erroneously or illegally collected with respect to any articles, to the extent that such net income does not exceed the amount of the burden of such Federal excise taxes with respect to such articles which such person shifted to others.

(b) The net income (specified in subsection (a) (1)) from the sale of articles with respect to which the Federal excise tax was not paid, and the net income specified in subsection (a) (2) or (3), shall not include the net income from the sale of any article, from reimbursement with respect to any article, or from refund or credit of Federal excise tax with respect to any article (1) if such article (or the articles processed therefrom) were not sold by the taxpayer on or before the date of the termination of the Federal excise tax; (2) if the taxpayer made a tax adjustment with respect to such article (or the articles processed therefrom) with his vendee; or (3) if under the terms of any statute the taxpayer would have been entitled to a refund from the United States of the Federal excise tax with respect to the article otherwise than as an erroneous or illegal collection (assuming, in case the tax was not paid, that it had been paid).

(c) The net income from the sales specified in subsection (a) (1) shall be computed as follows:

(1) From the gross income from such sales there shall be deducted the allocable portion of the deductions from gross income for the taxable year which are allowable under the applicable Revenue Act; or

(2) If the taxpayer so elects by filing his return on such basis the total net income for the taxable year from the sale of all articles with respect to which each Federal excise tax was imposed (computed by deducting from the gross income from such sales the allocable portion of the deductions from gross income which are allowable under the applicable Revenue Act, but without deduction of the amount of such Federal excise tax which was paid or of the amount of reimbursement to purchasers with respect to such Federal excise tax) shall be divided by the total quantity of such articles sold during the taxable year and the quotient shall be multiplied by the quantity of such articles involved in the sales specified in subsection (a)(1). Such quantities shall be expressed in terms of the unit on the basis of which the Federal excise tax was imposed.

For the purposes of this section the proper apportionment and allocation of deductions with respect to gross income shall be determined under rules and regulations prescribed by the Commissioner with the approval of the Secretary.

(d) The net income from reimbursement or refunds specified in subsection (a) (2) or (3) shall be computed as follows: From the total payment or accrual (1) of reimbursement to the taxpayer from vendors for amounts representing Federal excise tax burdens included in prices paid by the taxpayer to such vendors or (2) of refunds or credits to the taxpayer of Federal excise taxes erroneously or illegally collected, there shall be deducted the expenses and fees reasonably incurred in obtaining such reimbursement or refunds.

(e) For the purposes of subsection (a) (1), (2), and (3), the extent to which the taxpayer shifted to others the burden of a Federal excise tax shall be presumed to be an amount computed as follows:

(1) From the selling price of the articles there shall be deducted the sum of (A) the cost of such articles plus (B) the average margin with respect to the quantity involved; or

(2) If the taxpayer so elects by filing his return on such basis, from the aggregate selling price of all articles with respect to which such Federal excise tax was imposed and which were sold by him during the taxable year (computed without deduction of reimbursement to purchasers with respect to such Federal excise tax) there shall be deducted the aggregate cost of such articles, and the difference shall be reduced to a margin per unit in terms of the basis on which the Federal excise tax was imposed. The excess of such margin per unit over the average margin (computed for the same unit) shall be multiplied by the number of such units represented by the articles with respect to which the computation is being made; but

(3) In no case shall the extent to which the taxpayer shifted to others the burden of the Federal excise tax with respect to the articles be deemed to exceed the amount of such tax with respect to such articles minus (A) the portion of the amount of the Federal excise tax (or of the reimbursement specified in subsection (a) (2)) with respect to the articles which is paid or credited by the taxpayer to any purchasers as specified in subsection (f) (3) and minus (B) the amount of any increase in the tax under section 602 of the Revenue Act of 1932 for which the taxpayer under this section became liable as the result of the nonpayment or refund of the Federal excise tax with respect to the articles.

(f) As used in this section—

(1) The term "margin" means the difference between the selling price of articles and the cost thereof, and the term "average margin" means the average difference between the selling price and the cost of similar articles sold by the taxpayer during his six taxable years preceding the initial imposition of the Federal excise tax in question, except that if during any part of such six-year period the taxpayer was not in business, or if his records for any part of such period are

so inadequate as not to furnish satisfactory data, the average margin of the taxpayer for such part of such period shall, when necessary for a fair comparison, be deemed to be the average margin, as determined by the Commissioner, of representative concerns engaged in a similar business and similarly circumstanced.

(2) The term "cost" means, in the case of articles manufactured or produced by the taxpayer, the cost to the taxpayer of materials entering into the articles; or, in the case of articles purchased by the taxpayer for resale, the price paid by him for such articles (reduced in both cases by the amount for which he is reimbursed by his vendor).

(3) The term "selling price" means selling price minus (A) amounts subsequently paid or credited to the purchaser on or before June 1, 1936, or thereafter in the bona fide settlement of a written agreement entered into on or before March 3, 1936, as reimbursement for the amount included in such price on account of a Federal excise tax; and minus (B) the allocable portion of any professional fees and expenses of litigation incurred in securing the refund or preventing the collection of the Federal excise tax, not to exceed 10 per centum of the amount of such tax.

(g) In determining costs, selling prices, and net income, the taxpayer shall, unless otherwise shown, be deemed to have sold articles in the order in which they were manufactured, produced, or acquired. Where the taxpayer's records do not adequately establish the quantity of a commodity taxable under the Agricultural Adjustment Act, as amended, entering into articles sold by him, such quantities shall be computed by the use of the conversion factors prescribed in regulations under such Act, as amended.

(h) If the taxpayer made any purchase or sale otherwise than through an arm's-length transaction, and at a price other than the fair market price, the Commissioner may determine the purchase or sale price to be that for which such purchases or sales were at that time made in the ordinary course of trade.

(i) Either the taxpayer or the Commissioner may rebut the presumption established by subsection (e) by proof of the actual extent to which the taxpayer shifted to others the burden of the Federal excise tax. Such proof may include, but shall not be limited to:

(1) Proof that the change or lack of change in the margin was due to changes in factors other than the tax. Such factors shall include any clearly shown change (A) in the type of grade of article or materials, or (B) in costs of production. If the taxpayer asserts that the burden of the tax was borne by him while the burden of any other increased cost was shifted to others, the Commissioner shall determine, from the respective effective dates of the tax and of the other increase in cost as compared with the date of the change in margin, and from the general experience of the industry, whether the tax or the increase in other cost was shifted to others. If the Commissioner determines that the change in margin was due in part to the tax and in part to the increase in other cost, he shall apportion the change in margin between them.

(2) Proof that the taxpayer modified contracts of sale, or adopted a new contract of sale, to reflect the initiation, termination, or change in amount of the Federal excise tax, or at any such time changed the sale price of the article (including the effect of a change in size, package, discount terms, or any other merchandising practice) by substantially the amount of the tax or change therein, or at any time billed the tax as a separate item to any vendee or indicated by any writing that the sale price included the amount of the tax, or contracted to refund any part of the sale price in the event of recovery of the tax or decision of its invalidity; but the taxpayer may establish that such acts were caused by factors other than the tax, or that they do not represent his practice during the period in which the articles in question were sold.

(j) As used in this section—

(1) The term "Federal excise tax" means a tax or exaction with respect to the sale, lease, manufacture, production, processing, ginning, importation, transportation, refining, recovery, or holding for sale or other disposition, of commodities or articles, provided for by any Federal statute, whether valid or invalid, if denominated a "tax" by such statute. A Federal excise tax shall be deemed to have been imposed with respect to an article if it was imposed with respect to (or with respect to the processing of) any commodity or other article, from which such article was processed.

(2) The term "date of the termination of the Federal excise tax" means, in the case of a Federal excise tax held invalid by a decision of the Supreme Court, the date of such decision.

(3) The term "refund or credit" does not include a refund or credit made in accordance with the provisions and limitations set forth in Title VII of this Act, or in section 621 (d) of the Revenue Act of 1932.

(4) The term "tax adjustment" means a repayment or credit by the taxpayer to his vendee of an amount equal to the Federal excise tax with respect to an article (less reasonable expense to the vendor in connection with the nonpayment or recovery by him of the amount of such tax and in connection with the making of such repayment or credit) if such repayment or credit is made on or before June 1, 1936, or thereafter in the bona fide settlement of a written agreement entered into on or before March 3, 1936.

(5) The term "taxpayer" means a person subject to a tax imposed by this section.

(k) All references in this section to the purchase or sale (or to parties to the sale) of articles with respect to which a Federal excise tax was imposed shall be deemed to include the purchase or sale (or parties to the sale) of services with respect to which a Federal excise tax was imposed, and for the purposes of subsection (a) the extent to which the tax-

payer shifted to others the burden of such Federal excise tax with respect to such services shall be presumed to be an amount computed as follows: From the selling price of the services there shall be deducted the average price received by the taxpayer for performing similar services during the six taxable years preceding the initial imposition of the Federal excise tax in question. The balance (to the extent that it does not exceed the amount of such Federal excise tax with respect to such services minus any payments or credits with respect to the services made to purchasers as specified in subsection (f) (3)) shall be the extent to which the taxpayer shifted the burden of such Federal excise tax to others. If during any part of such six-year period the taxpayer was not in business, or if his records for any part of such period are so inadequate as not to furnish satisfactory data, the average price of the taxpayer for such part of such period shall, when necessary for a fair comparison, be deemed to be the average price, as determined by the Commissioner, of representative concerns engaged in a similar business and similarly circumstanced. The presumption established by this subsection may be rebutted by proof of the character described in subsection (i).

(l) The taxes imposed by subsection (a) shall be imposed on the net income from the sources specified therein, regardless of any loss arising from the other transactions of the taxpayer, and regardless of whether the taxpayer had a taxable net income (under the income-tax provisions of the applicable Revenue Act) for the taxable year as a whole; except that if such application of the tax imposed by subsection (a) is held invalid, the tax under subsection (a) shall apply to that portion of the taxpayer's entire net income for the taxable year which is attributable to the net income from the sources specified in such subsection.

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Section 21 (d) (1) of the AAA as Amended by Act of August 24, 1935.

(d) (1) No recovery, recoupment, set-off, refund, or credit shall be made or allowed of, nor shall any counterclaim be allowed for, any amount of any tax, penalty, or interest which accrued before, on, or after the date of the adoption of this amendment under this title (including any overpayment of such tax), unless, after a claim has been duly filed, it shall be established, in addition to all other facts required to be established, to the satisfaction of the Commissioner of Internal Revenue, and the Commissioner shall find and declare of record, after due notice by the Commissioner to such claimant and opportunity for hearing, that neither the claimant nor any person directly or indirectly under his control or having control over him, has, directly or indirectly, included such amount in the price of the article with respect to which it was imposed or of any article processed from the commodity with respect to which it was imposed, or passed on any part of such amount to the vendee or to any other person in any manner, or included any part of such amount in the charge or fee for processing, and that the price paid by the claimant or such person was not reduced by any part of such amount. In any judicial proceeding relating to such claim, a transcript of the hearing before the Commissioner shall be duly certified and filed as the record in the case and shall be so considered by the court. The provisions of this subsection shall not apply to any refund or credit authorized by subsection (a) or (c) of section 15, section 16, or section 17 of this title, or to any refund or credit to the processor of any tax paid by him with respect to the provisions of section 317 of the Tariff Act of 1930.

Revenue Act of 1928, Section 424—Refund of Automobile Accessories Tax.

(a) No refund shall be made of any amount paid by or collected from any manufacturer, producer, or importer in respect of the tax imposed by subdivision (3) of section 600 of the Revenue Act of 1924, or subdivision (3) of section 900 of the Revenue Act of 1921 or of the Revenue Act of 1918, unless either—

(1) Pursuant to a judgment of a court in an action duly begun prior to April 30, 1928; or

(2) It is established to the satisfaction of the Commissioner that such amount was in excess of the amount properly payable upon the sale or lease of an article subject to tax, or that such amount was not collected, directly or indirectly, from the purchaser or lessee, or that such amount, although collected from the purchaser or lessee, was returned to him; or

(3) The Commissioner certifies to the proper disbursing officer that such manufacturer, producer, or importer has filed with the Commissioner, under regulations prescribed by the Commissioner with the approval of the Secretary, a bond in such sum and with such sureties as the Commissioner deems necessary, conditioned upon the immediate repayment to the United States of such portion of the amount refunded as is not distributed by such manufacturer, producer, or importer, within six months after the date of the payment of the refund, to the persons who purchased for purposes of consumption (whether from such manufacturer, producer, importer, or from any other person) the articles in respect of which the refund is made, as evidenced by the affidavits (in such form and containing such statements as the Commissioner may prescribe) of such purchasers, and that such bond, in the case of a claim allowed after February 28, 1927, was filed before the allowance of the claim by the Commissioner.

United States Revised Statutes.

Sec. 3220. [As amended by Sec. 1111 of the Revenue Act of 1926, c. 27, 44 Stat. 9, and Sec. 619 of the Revenue Act of 1928, c. 852, 45 Stat. 791.] Except as otherwise provided by law in the case of income, war-profits, excess-profits, estate, and gift taxes the Commissioner of Internal Revenue, subject to regulations prescribed by the Secretary of the Treasury, is authorized to remit, refund, and pay back all taxes erroneously or illegally assessed or collected, all penalties collected without authority, and all taxes that appear to be unjustly assessed or excessive in amount, or in any manner wrongfully collected; also to repay to any collector or deputy collector the full amount of such sums of money as may be recovered against him in any court, for any internal-revenue taxes collected by him, with the cost and expenses of suit; also all damages and costs recovered against any assessor, assistant assessor, collector, deputy collector, agent, or inspector, in any suit brought against him by reason of anything done in the due performance of his official duty, and shall make report to Congress at the beginning of each regular session of Congress of all transactions under this section (U. S. C., Title 26, Sec. 1670).

Sec. 3224. No suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court (U. S. C., Title 26, Sec. 1543).

Sec. 3226. [As amended by Sec. 1103 of the Revenue Act of 1932, c. 209, 47 Stat. 169.] No suit or proceeding shall be maintained in any court for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected until a claim for refund or credit has been duly filed with the Commissioner of Internal Revenue, according to the provisions of law in that regard, and the

regulations of the Secretary of the Treasury established in pursuance thereof; but such suit or proceeding may be maintained, whether or not such tax, penalty, or sum has been paid under protest or duress. No such suit or proceeding shall be begun before the expiration of six months from the date of filing such claim unless the Commissioner renders a decision thereon within that time, nor after the expiration of two years from the date of mailing by registered mail by the Commissioner to the taxpayer of a notice of the disallowance of the part of the claim to which such suit or proceeding relates (U. S. C., Title 26, Secs. 1672-1673).

Sec. 3228. [As amended by Sec. 1112 of the Revenue Act of 1926, Sec. 619 of the Revenue Act of 1928, and Sec. 1106 of the Revenue Act of 1932.] (a) All claims for the refunding or crediting of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty alleged to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected must, except as otherwise provided by law in the case of income, war-profits, excess-profits, estate, and gift taxes, be presented to the Commissioner of Internal Revenue within four years next after the payment of such tax, penalty, or sum. The amount of the refund (in the case of taxes other than income, war-profits, excess-profits, estate, and gift taxes) shall not exceed the portion of the tax, penalty, or sum paid during the four years immediately preceding the filing of the claim, or if no claim was filed, then during the four years immediately preceding the allowance of the refund. * * * (U. S. C., Title 26, Sec. 1433.)

Regulations 47.

(Revised August 1, 1924)
Relating to

THE EXCISE TAXES
On Sales By the Manufacturer
Under
Section 600 of the Revenue Act of 1924

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Art. 3. *Basis of tax.*—The tax is imposed on the sale by the manufacturer and should be returned and paid by him whether the sales price is actually collected or not. It is measured by the price for which the article is sold by the manufacturer and not by the list price where that differs from the actual sales price. If the price of a taxable article is increased to cover the tax, and the article is sold at such price, including the tax, the tax is on such increased price.

The manufacturer may reimburse himself in the amount of the tax by agreement with the purchaser in the following manner: (a) By quoting the selling price and the tax in separate and exact amounts, and where invoices are rendered, by segregating these amounts on the invoices as outlined in examples (1) and (5) below; or (b) by stating to the purchaser in advance of the sale what portion of the quoted charge represents the price charged for the article and what portion represents tax, and where invoices are rendered by invoicing in the manner outlined in example (2) below, in which case the amount of the tax need not be included in computing the tax.

Where goods are ordered direct from the manufacturer with no agreement as to price, the tax is based on the amount billed or invoiced to the purchaser as the selling price. Mere statements or agreements that the quoted or contract price includes the tax do not operate to exclude any part thereof from tax, unless the price is billed in the manner outlined in example (1), (2), or (5) below.

Where a lump sum is specified as the price of a taxable article or articles, and other articles not taxable and not a component part of the taxable articles are included in the price, the tax attaches to the entire amount unless the selling prices of the taxable and nontaxable articles are segregated. In such case the tax will be measured by the price specified as the selling price of the taxable article or articles (examples 3 and 4). *The following examples illustrate the method by which the manufacturer may separate the tax from the selling price in invoicing goods to the purchaser.*

Example (1). A, the manufacturer, quotes a selling price to B of $100 and bills the goods to B as:

"Article No. 1, selling price, $100; tax $5."

Example (2). A, the manufacturer, quotes a charge of $105, stating that 20/21 of the charge represents the price and 1/21 represents the tax, billing the goods to B as:

"Article No. 1, charge $105, 20/21 of the total represents price, and 1/21 represents tax."

The tax in examples (1) and (2) is computed on $100, the quoted and actual selling price.

It should be noted that the above examples apply to articles taxable at 5 per cent. The same general principles apply where other rates obtain, though the fractions as used in example (2) would vary.

Example (3). A, the manufacturer, quotes a selling price or contracts to sell goods at $105, including tax, and bills the goods to B as:

"Article No. 1, selling price, including tax, $105."

The tax is computed on $105, the quoted and invoiced selling price.

Example (4). A manufacturer sells an automobile to B, including insurance, gas, and oil, and bills it as:

"One car, 2,150."

The tax is based on the full amount of $2,150.

Example (5). If in example (4) the invoice separates the charges into items, as "chassis $1,500, body $500, gas and oil $20, insurance $30, tax $100," the tax is based on $2,000, the selling price of the chassis and body as specified.

The underlying principle involved in examples (1) and (2) is that the price constitutes the basis for computing the tax and must be specified. *As the price itself forms the basis for computing the tax, it is just as important that this item be mentioned as that the tax be specified.* A manufacturer does not properly compute a 5 per cent tax on a sale at a price of $105 by taking 1/21 of that sum, even though he might say that the price was $105 and that 1/21 was tax. If $105 is designated as the price of an article, even though it be stated that such price includes the tax, the tax nevertheless applies to such entire price, and the fact that some part of it may be used to pay taxes affords no ground for concluding that the remaining portion, that is, the net proceeds of the sale after tax is paid, should form the basis for computing taxes. In case the manufacturer sells tires subject to 2½ per cent tax, and desires to collect the tax in addition to the price, charging $40 as the price of the tires and $1 as tax, the terms of sale should show specifically that $40 is the price and $1 is tax, or he can indicate that $41 will be a charge made up of two items, 40/41 of the charge being the price and 1/41 being the tax; price lists, billings, invoices, etc., being made out accordingly. *In other words, both price and tax must be designated and specified.* (Italics supplied.)

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TREASURY DEPARTMENT

Washington.

September 25, 1934.

File No. M-T-PT:C

Mr. W. Ray Bell,
The Association of Cotton Textile Merchants
of New York,
40 Worth Street,
New York City, New York.

Sir:

Reference is made to your letter of August 31, 1934, in which you advise this office that certain states, particularly the State of New Jersey, have deducted from their remittances covering invoices for cotton fabrics and other cotton articles the amount of the enhancement of the price incident to the processing tax imposed under the Agricultural Adjustment Act. You state that you cannot legally sue the state and request to be advised what steps you should take in order to meet the situation. You suggest the possibility that the regulations of this Department could be amended so as to provide for refund of taxes paid with respect to articles delivered to any sovereign state.

In reply you are advised that Article 9 (2) (b) of Regulation 81 provides in part that processing for, or for the sale to the United States, a state, a territory, or a possession is subject to the tax, whether or not the commodity or the product derived from the commodity is owned by the United States, such state, such territory, or such possession.

The processing tax attaches upon the first domestic processing of cotton and is payable by the processor. *The amount paid as tax with respect to such commodity increases the cost of conducting his business and becomes an indivisible part of the production cost, similar to the man-*

ner in which other expenses such as depreciation, interest on capital invested, and taxes paid to the state, are incident to the conduct of a manufacturing business and enhance the cost of articles produced. The processing tax cannot be considered as a tax with respect to any person other than the person liable to the government for the tax.

The addition to the net sale price of an article sold to the State of New Jersey, of an amount equal to the processing tax paid with respect to such article cannot properly be said to be an addition of the processing tax to such price, but is a procedure resorted to by the vendor to designate the proportionate amount of the gross sales price which was expended as a production cost incident to the processing tax and to explain the resulting increment in such gross sales price.

There are no provisions in the law on which to base an amendment to the regulation providing for refund of taxes paid with respect to articles delivered to a sovereign state, except where the articles are delivered for charitable distribution, or use, or for the use of an organization engaged in welfare work. Therefore, the matter does not come within the jurisdiction of this Bureau, but is a matter to be adjusted between the parties concerned. (Italics supplied.)

Respectfully,

(Signed) D. S. Bliss,
Deputy Commissioner.